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A SELECTION

OF

LEADING CASES IN EQUITY.

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LEADING CASES IN EQUITY,

With Notes.

VOL. I.

BY

FREDERICK THOMAS WHITE,

AND

OWEN DAVIES TUDOR.

(OF THE MIDDLE TEMPLE, ESQRS., BARRISTERS-AT-LAW.)

FIFTH EDITION.

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PREFACE TO THE FIRST EDITION OF VOL. I.

The plan of this work was suggested by the very able volumes of the late Mr. John William Smith, which contain a selection of Leading Cases principally taken from the Common Law Reports; and it was thought that it might be useful to the profession to have, within a small compass, a selection of Leading Cases decided in Courts of Equity.

Each of the cases chosen will, it is believed, be found either to be frequently referred to in practice, or to enunciate clearly, for the first time, some important principle of equity.

A chronological arrangement of the cases has not been observed, because it has been in the present, and may be in a subsequent volume, found useful to print together cases on the same subject, decided at different periods.

The notes, or abstracts prefixed to the cases, have occasionally, when inaccurate or defective, been altered ; and, in some instances, the arguments and judgment in the same case are taken from different reports. Thus, in the well-known case of *Fox* v. *Mackreth*, the arguments are taken from Brown's Chancery Cases, and the judgment from Cox's Reports ; and in the celebrated case of *Garth* v. *Cotton* (a complete report of which is not to be found elsewhere), the arguments are taken from two different places in Vesey Senior's Reports, the judgment from Dicken's Reports, and the decree from Atkyn's Reports.

In the notes an attempt has been made to develope the principles laid down or acted upon in the cases, and to collect the recent authorities ; but as the nature of the work would not permit that the notes should be complete essays upon the different subjects treated of, they have been principally confined to the points decided in the cases, to which, in fact, they are only intended to be subsidiary.

It will be seen that, in the notes, some cases of importance are stated at considerable length, and that when it was convenient or practicable, the very words of the Judges have been preserved.

Of imperfections and deficiencies in the notes, the

Editors are by no means unconscious, but they venture to hope that the cases (the selection of which, from the great mass of the Equity Reports, was a matter of no small difficulty) will prove useful both to students and to those in actual practice.

July, 1849.

ADVERTISEMENT

TO THE FIFTH EDITION.

In preparing this Edition, much new matter has been added to the Notes. A very large addition has also been made to the cases cited, which have been brought down to the latest period. The effect of the Judicature Acts (36 & 37 Vict. c. 66, and 38 & 39 Vict. c. 77) has, where necessary, been noticed and commented upon.

The Supreme Court of Judicature Act (Ireland), 1877, 40 & 41 Vict. c. 57, was passed after this work had gone through the press.

In the second volume the case of *Silk* v. *Prime* (1 Bro. C. C. 138, n.), and the note thereon, have been omitted in this Edition, inasmuch as the doctrine relating to equitable assets has been rendered practically unimportant by Mr. Hinde Palmer's Act

(32 & 33 Vict. c. 46), making specialty and simple contract debts payable *pari passu*.

Two new cases, viz., *Savage* v. *Foster* (9 Mod. 35), and *Hornsby* v. *Lee* (2 Madd. 16), with notes, have been added to the second volume.

Nov. 1877.

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ADDENDA TO VOL. I.

[*The Addenda comprehend the Cases reported up to the* 1*st of October*, 1877.]

Page 32, column 1, six lines from the bottom, after "1 J. & W. 572," add "*In re Nelley's Trusts*, W. N. 1877, p. 120."

,, 43, column 1, thirteen lines from the bottom, after "14 W. R. (M. R.) 121," add "*Clark* v. *Girdwood*, W. N. 1877, p. 112."

,, 43, column 2, line fourteen from the top, after "8 W. R. (V.-C. S.) 537," add "*MacCormack* v. *MacCormack*, 11 I. R. Eq. 130."

,, 52, column 1, thirteen lines from the bottom, after "11 Exch. 313," add "As to encroachments by copyhold tenants upon the waste of the manor, see *Attorney-General* v. *Tomline*, 5 Ch. D. 750. And in a recent case, where the trustees of land, affecting actual ownership, acquired from the Crown a right of fishing in the adjacent sea, it was held by the House of Lords, affirming the decision of the Court of Session in Scotland, that the acquisition enured for the benefit of the cestui que trust: *Aberdeen Town Council* v. *Aberdeen University*, 2 App. Ca. 544."

,, 103, column 2, eight lines from the top, after "7 L. R. Ho. Lo. 731, 736," add "*Oram* v. *Richardson*, W. N. 1877, p. 13."

,, 116, column 1, twenty-five lines from the top, after "23 Beav. 28," add "and *Dawson* v. *Bank of Whitehaven*, 4 Ch. D. 396."

,, 118, column 2, seventeen lines from the top, after "take advantage," add "See, also, *In re Warnock's Estate*, 11 I. R. Eq. 212."

,, 159, column 2, four lines from the bottom, after "6 L. R. Ho. Lo. 328, 349," add "*In re Imperial Land Co. of Marseilles, Ex parte Larking*, 4 Ch. D. 566; *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. D. 73."

,, 162, column 1, seven lines from the bottom, after "1 De G. & Jo. 372," add "When moreover a director takes debentures issued by the company at a discount, being the same terms on which they were taken by others, it is not illegal, and the director will not be liable to the company for the difference between what he gave for the shares and their nominal value: *In re Compagnie Générale de Bellgarde, Campbell's Case*, 4 Ch. D. 470."

,, 169, column 2, nine lines from the top, after "4 De G. & Sm. 388," add "But an agent employed to sell an estate may, with the consent of his principal, make a profit by the transaction, as, for instance, where the bargain between them was that the agent should have whatever the estate fetched above a certain sum: *Morgan* v. *Elford*, 4 Ch. D. 352."

,, 176, column 1, fifteen lines from the top, after "7 I. R. Eq. 325, 424," add "*Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394."

Page 184, column 2, second line from the top, after "13 Ir. Ch. Rep. 250," add "*Turner* v. *Tepper*, *Widgery* v. *Tepper*, W. N. 1877, p. 139."

,, 241, column 2, after "*Tucker* v. *Burrow*, 2 Hem. & Mill. 515, 524," add "*Hart* v. *Hart*, W. N. 1877, p. 184."

,, 267, column 1, eighteen lines from the top, after the words "sect. 18," add "19 & 20 Vict. c. 120, has been repealed by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), but sections 11 and 13 of the former Act are in effect re-enacted by sections 16 and 19 of the latter Act."

,, 317, column 1, third line from the bottom, after "15 Beav. 408," add "It has been recently held that a settlement of leasehold property is not a voluntary conveyance under 27 Eliz. c. 4, upon the ground that the assignment of leasehold property to which liability is attached is in itself a conveyance for valuable consideration: *Price* v. *Jenkins*, 5 Ch. D. 619."

,, 318, column 1, two lines from the top, after "6 I. R. Eq. 391," add "And it is settled that if husband and wife, each of them having interests, no matter how much, or of what degree or of what quality, although subsequent to marriage, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife for valuable consideration: *Teasdale* v. *Braithwaite*, 4 Ch. D. 85; 5 Ch. D. 630; *Hewison* v. *Negus*, 16 Beav. 594; affirmed by the Lords Justices 17 Jur. 567; *Gale* v. *Gale*, W. N. 1877, p. 154; *Foster* v. *Lister*, W. N. 1877, p. 95."

,, 353, column 1, seventeen lines from the bottom, after "is settled," add "So where the consideration for the conveyance to a company was £6,000, to be paid out of money to be received by the company from the sale of shares, and the company proved abortive, it was held that the vendor had no lien for the £6,000: *In re Brentwood Brick and Coal Co.*, 4 Ch. D. 562; and see *Gore and Durant's Case*, 2 L. R. Eq. 349."

,, 379, column 2, twelve lines from the top, after "*Grissell* v. *Swinhoe*, 7 L. R. Eq. 291," add "*Pickersgill* v. *Rodger*, 5 Ch. D. 163."

,, 412, column 2, twenty-two lines from the top, after "*Griggs* v. *Gibson*, 1 L. R. Eq. 685," add "*Bennett* v. *Houldsworth*, W. N. 1877, p. 88."

,, 442, column 1, line sixteen from the bottom, the passage commencing "Where moreover," and ending "testator taking effect," page 443, column 2, should come after "(1 Pow. 545)," page 444, column 2, seven lines from the bottom.

,, 537, column 1, twenty-three lines from the top, for "4 Rep." read "4 Russ."

,, 540, column 1, twenty-three lines from the top, after "*La Touche* v. *La Touche*, 3 H. & C. 576, add "*Davies* v. *Jenkins*, W. N. 1877, p. 161."

,, 540, column 2, six lines from the top, after "1 Ves. jun. 513," add "and on a guarantee for the payment of the value of goods supplied to another at her request: *Morrell* v. *Cowan*, W. N. 1877, p. 170."

,, 553, column 1, nineteen lines from the top, after "he is a trustee," add "*Green* v. *Carlill*, 4 Ch. D. 882."

,, 563, column 1, twenty-one lines from the top, after "separate estates," add "See, also, *Farrow* v. *Smith*, W. N. 1877, p. 21."

,, 565, column 2, twenty lines from the bottom, after "M.R. 1057," add "If a husband either expressly or impliedly agrees that his wife shall carry on a business for her own benefit separately from and independently of him, making the carrying on separately and distinctly a separate use for her, then the trade becomes her separate property, and everything that is incident to and connected with the trade becomes part of that separate trade, and the husband is, if and so far as it is necessary, a trustee of everything

which was devoted to that trade of which he had allowed the wife to be the separate owner: *Ashworth* v. *Outram*, 5 Ch. D. 923; *In re Beale, Ex parte Corbridge*, 4 Ch. D. 246; *Pearse* v. *Pearse*, W. N. 1877, p. 120."

Page 582, column 1, nineteen lines from the top, after "8 I. R. Eq. 93," add "And by sect. 19 of the East India Loan Act, 1877, 40 & 41 Vict. c. 51, the provisions contained in the 3rd section of 33 & 34 Vict. c. 93, and all other enactments in the said Act relating to or affecting such provisions, are extended and made applicable to any capital stock created under this Act."

,, 584, column 2, twenty-one lines from the bottom, after "insurance money, *Ib.*" add "for form of order under sect. 10, see *In re Mellor's Policy Trusts*, W. N. 1877, p. 183."

,, 591, at the end of the note add "As to the legislation for the protection of the property of married women in Scotland, see 24 & 25 Vict. c. 86; 37 & 38 Vict. c. 31; 40 & 41 Vict. c. 29."

,, 656, column 2, seven lines from the top, after "in possession," add "See *O'Rorke* v. *Bolinbroke*, W. N. 1877, p. 204.

,, 667, column 2, eleven lines from the top, after "prior equity," add "But where several successive equitable mortgagees have advanced their money with notice of a first mortgage, none of them, by taking a transfer of the first mortgage, can gain priority over the other equitable mortgagees, who will rank in order of date: *Pilkington* v. *Baker*, W. N. 1877, p. 201."

,, 673, column 2, in line four from the top, for "incumbrancer" read "incumbrance."

,, 678, column 1, eight lines from the bottom, after "*Adams* v. *Angell*," add "5 Ch. D. 634."

,, 716, column 2, sixth line from the bottom, after "of all tenures," add "The Lord Chancellor's bill was passed into an Act, 40 & 41 Vict. c. 34."

,, 717, column 1, four lines from the bottom, after "by an intestate," add "The Lord Chancellor's Bill was passed into an Act, 40 & 41 Vict. c. 34."

,, 729, column 1, sixteen lines from the bottom, after the words "of an intestate," add "The Lord Chancellor's Bill passed into an Act, 40 & 41 Vict. c. 34."

,, 738, column 1, nine lines from the bottom, after "*In re Trethowan*," add "5 Ch. D. 559."

,, 750, column 2, ten lines from the bottom, after "*White* v. *Simmons*, 6 L. R. Ch. App. 555," add "*Ex parte Pannell, In re England*, W. N. 1877, p. 188."

"And an equitable mortgagee, by deposit of deeds of a company, may, after a resolution of the shareholders that the company should be wound up voluntarily, commence an action in the Chancery Division for foreclosure. *In re David Lloyd and Co.*, W. N. 1877, p. 197."

,, 796, column 2, twelve lines from the bottom, after "7 L. R. Ch. App. 676," add "*Lowndes* v. *Norton*, W. N. 1877, p. 154."

,, 799, column 1, after the fourth line from the top, add "By 40 & 41 Vict. c. 33 (brought in as a bill by the Lord Chancellor) a contingent remainder created after the passing of the Act (2nd August, 1877) in the event of the particular estate determining before the contingent remainder vests, the latter is capable of taking effect, in all respects, as if it had originally been created as a springing or shifting use or executory devise, or other executory limitation. Sect. 1."

,, 821, column 2, eighteen lines from the bottom, after "the principal case,"

add "And Sir G. *Jessel*, M. R., in a recent case, *In re Cavendish*, *Cavendish* v. *Mundy*, W. N. 1877, p. 198, observed that the dictum of Lord *Romilly* in *Bagot* v. *Bagot* was directly contrary to the rule laid down in *Garth* v. *Cotton*, and he would not follow it."

Page 825, column 1, thirteen lines from the bottom, after the words "entitled; s. 23," add 19 & 20 Vict. c. 120 has been repealed by "The Settled Estates Act, 1877" (40 & 41 Vict. c. 18), but the 11th and 12th sections of the former Act are with some variations re-enacted by the 16th and 34th sections of the latter Act."

,, 842, column 1, line sixteen from the bottom, after "*Ungley* v. *Ungley*, 4 Ch. D. 73," add "affirmed by the Court of Appeal, 5 Ch. D. 887."

,, 845, column 1, eighteen lines from the top, after "4 L. R. Eq. 88," add "*Riordan* v. *Banon*, 10 I. R. Eq. 469."

,, 884, column 1, two lines from the top, after "2 Madd. 198," add "*Wolmeshausen* v. *O'Connor*, W. N. 1877, p. 113."

,, 909, column 1, line seven from top, for "Money notionally," read "Money by will notionally."

,, 909, column 2, eleven lines from the top, after "7 L. R. Exch. 140," add "But money notionally converted into land, if not liable to legacy duty is liable to succession duty under 16 & 17 Vict. c. 51, s. 18." *Ib.*

,, 913, column 1, twenty lines from the top, after "15 L. R. Eq. 78," add "*Coyne* v. *Coyne*, 10 I. R. Eq. 496."

,, 922, column 1, fourteen lines from the bottom, after "11 Beav. 525," add "*Ralph* v. *Carrick*, 5 Ch. D. 984, 996."

,, 927, column 2, fifteen lines from the bottom, after "*Emuss* v. *Smith*, 2 De G. & Sm. 722," add "*Coyne* v. *Coyne*, 10 I. R. Eq. 496."

,, 934, column 1, thirteen lines from the bottom, after "*Sisson* v. *Giles*, 3 De G. Jo. & Sm. 614," add "*Meek* v. *Devenish*, W. N. 1877, p. 152."

,, 939, column 1, twelve lines from the bottom, after "2 Ves. jun. 73," add "But in a recent case the amount necessary for the repairs and improvements upon an estate of which a lunatic was tenant in tail was ordered to be raised by a mortgage thereof, although the sum necessary for the repairs and improvements of an estate of which he was owner in fee simple was ordered to be paid out of his personalty: *In re Gist* (*a person of unsound mind*), 5 Ch. D. 881. An estate tail, however, of a lunatic will not be barred in such a case further than is necessary for the purpose: *In re Pares*, 2 Ch. D. 61."

,, 949, line one, for "Ackroyd" read "Ackroyd."

,, 977, column 2, four lines from the top, after "real estate," add "See and consider *In re Newberry's Trusts*, 5 Ch. D. 746."

,, 1007, column 2, line 13 from the top, after *Rolls* v. *Pearce*, add "5 Ch. D. 730."

LEADING CASES IN EQUITY.

LORD GLENORCHY *v.* BOSVILLE.

De Term. S. Mich. 1733.

[REPORTED CAS. TEMP. TALBOT, 3.]

EXECUTED AND EXECUTORY TRUSTS.]—*A. devises real estate to his sister B. and C., and their heirs and assigns, upon trust, until his grand-daughter D. should marry or die, to receive the profits, and thereout to pay her* £100 *a year for her maintenance; the residue to pay debts and legacies; and after payment thereof, in trust for the said D.; and upon further trust, that, if she lived to marry a Protestant of the Church of England, and at the time of such marriage be at the age of twenty-one or upwards, or, if under that age, such marriage be with the consent of the said B., then* to convey the said estate, *with all convenient speed after such marriage, to the use of the said D. for life,* without impeachment of waste, voluntary waste in houses excepted; *remainder to her husband for life; remainder to the issue of her body; with remainders over: —Held, that though D. would have taken an estate tail had it been the case of an immediate devise, yet that the trust being executory, was to be executed in a more careful and more accurate manner; and that a conveyance to D. for life, remainder to her husband for life, with remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent.*

SIR THOMAS PERSHALL devises all his real estate to his sister, Anne Pershall, and Robert Bosville, and their

heirs and assigns, upon trust, till his grand-daughter, Arabella Pershall, marry or die, to receive the rents and profits thereof, and out of it to pay her 100*l.* a year for her maintenance; and, as to the residue, to pay his debts and legacies; and, after the payment thereof, then in trust for his said grand-daughter; and, upon further trust, that if she lived to marry a Protestant of the Church of England, and at the time of such marriage be of the age of twenty-one or upwards, or if under the age of twenty-one, and such marriage be with the consent of her aunt the said Anne Pershall, *then to convey the said estate* with all convenient speed after such marriage, *to the use of the said Arabella for her life, without impeachment of waste, voluntary waste in houses excepted;* remainder, after her death, to her husband for life; *remainder to the issue of her body;* with several remainders over; and, upon further trust, that if the said Arabella Pershall die unmarried, then to the use of the said Anne Pershall for life; remainder to the son of his other grand-daughter, Frances Ireland, in tail; remainder to Mr. Bosville, the defendant, for life; remainder to his first and other sons; remainder to the testator's right heirs; and, upon further trust, if his grand-daughter marry not according to the directions of his will, then, upon such marriage, to convey the said estate to trustees; as to one moiety thereof, to the use of the said Arabella for life; remainder to trustees to preserve contingent remainders; remainder to her first and every other son, being a Protestant; with several remainders over; and, as to the other moiety, to his daughter Ireland's son, in like manner.

Sir Thomas Pershall died in the year 1722, and Mrs. Arabella Pershall in 1723 attained her full age; and upon a treaty of marriage in 1729, she applies to the trustees for a conveyance of the estate to herself for life; remainder to her intended husband for life; remainder to the issue of her body; and such conveyance was executed by one of the trustees. But Mr. Bosville, the other trustee, who was also a remainder-man, refused to convey. However, she having by this conveyance a legal estate tail in

one moiety, and an equitable estate tail in the other moiety, suffered a recovery to the use of herself in fee, and in 1730 married the plaintiff, the Lord Glenorchy, who made a considerable settlement upon her; and as to her own estate, she covenanted to settle it upon the Lord Glenorchy and herself for life; remainder to the first and every other son of the marriage, in tail male; and, upon failure of such issue, to the survivor of the said husband and wife, in fee.

Argument for the plaintiffs.

The bill was, to have a conveyance of the moiety of the said trust estate from Mr. Bosville to such uses as are limited in the said covenant; and the principal question was, whether, under the said will, the Lady Glenorchy was tenant for life or in tail? upon which two other questions arose, viz., first, whether the words in the will, in an immediate devise of a legal estate, would have carried an estate tail? secondly, if so, whether the Court will make any difference between a legal title and a trust estate executory?

[*Lord Chancellor King.*—I should upon the first question make no difficulty of determining it an estate tail, had this been an immediate devise; but when you apply to this court for the carrying a trust estate into execution, the doubt is, whether we shall not vary from the rules of law to follow the testator's intent; which will also bring on another question,—What is the testator's intent in the present case?]

Upon the second question, it was argued for the plaintiffs, that the Lady Glenorchy was, under this will, entitled to an estate tail in equity; for this Court puts the same construction upon limitations of trusts in equity as the law does upon legal estates, and that to prevent confusion. This doctrine is laid down with the strongest reasons by the Earl of *Nottingham* in the *Duke of Norfolk's Case* (*a*); and the authority of *Baile* v. *Coleman*, 2 Vern. 670 (*b*), where a trust to one for life, remainder to the heirs male of his body, is held an estate tail, has never yet been questioned. So it is held in *Legatt* v. *Sewell*, 2 Vern. 551 (but more fully reported in 1 Abr. Eq. Ca.

(*a*) 3 Ch. Ca. 26—47; and 2 Swanst. 454.

(*b*) *S. C.*, 1 P. Wms. 142; 1 Ves. 151.

(*a*) *S. C.*, 1 P. Wms. 87; see 2 Ves. 657.

394) (*a*), where money was given to be laid out in land to one for life, and after his decease to his heirs male, and the heirs male of the body of every such heir male, severally and successively one after another; and a case being made for the opinion of the judges, as of a legal estate, they certified it to be an estate tail. So, in the case of *Bagshaw* v. *Downes*, or *Bagshaw* v. *Spencer*, at the Rolls, Hil. 6 Geo. 2 (*b*), an executory trust was directed to the judges for their opinion as a legal estate. Upon the same reason do cestuis que trust levy fines and suffer recoveries, which are held good in this Court. Indeed, in marriage articles, if they covenant to settle to the husband for life, remainder to the heirs of their two bodies, this Court will decree a conveyance in strict settlement, if any of the parties apply here, because the children are looked upon as purchasers. But in a will it is otherwise; they take through the bounty of the testator, and in such words as he gives it.

(*b*) *Bagshaw* v. *Spencer*, 2 Atk. 246, 570; on appeal, Id. 577.

It was further insisted for the plaintiffs, that the words *issue of her body* would make a difference from all other cases; for, in the Statute De Donis (13 Ed. 1) which created entails, it is said to be a proper word for that purpose, and is used no less than ten times in that statute; for this the authority of *King* v. *Melling*, 1 Vent. 214, 225 (*c*), and the reason there given, cannot be contested, which is also an authority in the principal case; for there it is held, that a devise to one for life, with a power to make a jointure, is much stronger to show the intent of the testator than the words *without impeachment of waste*. To A. for life, remainder to the issue of her body, and, for want of such issue, remainder over, was held an estate tail in the Court of Exchequer, in the case of *Williams* v. *Tompson*, about three or four years ago. Anders. 86. To one for life, remainder to the children of his body, is an entail. So in *Wild's Case*, 6 Co. 16 (L. Cas. R. Prop. 581, 2nd ed.), and *Sweetapple* v. *Bindon*, 2 Vern. 536.

(*c*) *S. C.*, 2 Lev. 58, 61.

It was further argued, that, if the remainder in this case to the issue be construed to be words of purchase, they must be attended with the greatest absurdity; for in

what manner can the issue take? All the sons, daughters, and grandchildren are issue; and if they take as purchasers, they must be joint-tenants, or tenants in common, and that for life only (*a*), 2 Vern. 545; which construction can never be agreeable to the testator's intent; and whatever estate was given in the first part of the will, yet the words, "*and for want of such issue, then*," &c., will give the plaintiff an estate tail, according to the cases of *Langley* v. *Baldwin*, and *Shaw* and *Weigh*, 1 Abr. Eq. Ca. 184, 185, Fitzg. 7. It was also further urged, that, from the face of the whole will, and by comparing this clause with the other, it appears that the testator intended the plaintiff, the Lady Glenorchy, should take an estate tail, and that the several clauses in a will are to be taken together, and make but one conveyance; and that it was a proper argument to prove the intention of the party from the different penning of the several clauses. The person who drew the will knew how to convey, either by words of limitation or purchase, where there was occasion for it; for where he limits the estate to Mrs. Ireland, it is in strict settlement by proper words of purchase; and so where he limits it to the Lady Glenorchy, in case she had married a Papist. But further, to shew he well understood the doctrine of conveyances, when he limits by words of purchase to sons not in esse, he has put in trustees to preserve contingent remainders, which he would certainly have done in this case had he intended the Lady Glenorchy an estate for life only.

(*a*) *Cook* v. *Cook*.

For the defendant, it was argued, that though in the construction of wills in this Court, uses and trusts are to be governed by the same rules as legal estates, and that there is but little difference between uses and trusts executed and legal estates; yet trusts executory are by no means under the same consideration. In the cases of *Legatt* v. *Sewell*, and *Baile* v. *Coleman*, the Judges were divided in their opinions, and since that time there is an express authority for the defendant. In the case of *Papillon* v. *Voice*, Hil. 5 Geo. 2 (*b*); so likewise in the

Argument for the defendant.

(*b*) 2 P. Wms. 471.

case of the *Attorney-General* v. *Young*, in the Court of Exchequer; and the case of *Leonard* v. *Earl of Sussex*, 2 Vern. 526; as also in the case of *Bramston* v. *Kinaston*, heard at the Rolls in June, 1728, where an estate was given by the testator to be settled upon his grandchild for her life, remainder to the issue of her body; and, when she applied to have an estate tail conveyed to her, she was decreed an estate for life only. And to show that this Court is not tied up to the rules of law in cases of executory trusts, the case of the *Earl of Stamford* v. *Sir John Hobart*, concerning Serjeant Maynard's will, was cited, where an estate was given to trustees to convey one moiety to Sir John Hobart, for ninety-nine years, in case he should so long live, with several remainders over; and this Court decreed the Master should settle the conveyance according to the letter of the will; but upon exceptions to the Master's Report, Nov. 19, 1709, it was ordered that proper estates should be made to support the remainders, that the testator's intent might not be frustrated; and this resolution was affirmed in the House of Lords (*a*). So in all matters executory, this Court endeavours to find the intent of the parties, and lets it prevail against the rules of law. In marriage settlements it was never doubted but that this Court would carry any words into strict settlement, if the intent of the parties was such; and so held in the case of *West* v. *Erisey*, in the House of Lords (*b*); and in that of *Trevor* v. *Trevor*, 1 Abr. Eq. Ca. 387 (*c*); and the same rules will prevail in cases executory, whether wills or articles. Besides, the present case is very much like that of marriage articles. The testator had all along the marriage of his grand-daughter in view, and intended this will as no more than heads or directions for the trustees in what manner he would have it settled: and so it remains to be carried into execution by the aid of this Court.

(*a*) 3 Bro. P. C. 31, Toml. ed., 30th Mar. 1710.

(*b*) 1 Bro. P. C. 225, Toml. ed., overruling the decision of the Barons of the Exchequer, reported 2 P. Wms. 349.

(*c*) *S. C.*, 1 P. Wms. 622; 5 Bro. P. C. 122, Toml. ed.

Then as to the word *issue*, it is sometimes a word of limitation, sometimes of purchase. There is a case mentioned in *Wild's Case*, 6 Co. 16, where to one and his children is held to be an estate tail; yet had it been to

one for life, remainder to his children, there can be no doubt but that it had been a bare estate for life. And as to the objection, that the issue, if purchasers, are to take jointly and for life only, why shall it not be as in cases where the limitation is to the first and every other son, and wherever heirs of the body are held to be words of purchase, they are construed to the first and every other son.

To make an estate tail arise by implication upon the words "*and for want of such issue*," has been cited the case of *Langley* v. *Baldwin*, 1 Abr. Eq. Ca. 185. But there is the case of *Bamfield* v. *Popham*, 2 Vern. 427, 449, for the defendant, so the case of *Loddington* v. *Kime*, 3 Lev. 431, and that of *Backhouse* v. *Wells*, 1 Abr. Eq. Ca. 184; besides, it is a general rule, that where an estate is to be raised by implication, it must be a necessary and inevitable implication, and such as that the words can have no other construction whatsoever; and in the present case, there is the word "*issue*" mentioned before; so that these last words must relate to the issue before mentioned. Whereas in the case of *Langley* v. *Baldwin*, the limitation is to six sons only; then come the words "*and for want of issue*," which words could not have relation to anything before mentioned.

Lord Chancellor Talbot had taken time to advise, and to have the opinion of the judges upon this case: And the same coming now again to be argued upon the same points that had been before the late Lord Chancellor (Lord *King*),

Argument for the plaintiffs.

It was insisted by the plaintiffs' counsel, that the Lady Glenorchy's marrying a Protestant of the Church of England at or after the age of twenty-one, or, if under that age, marrying such an one with her aunt's, or in case she was dead, with the other trustees' consent, was a condition precedent; which, when performed, would give her an estate tail. That this intent appeared from the different penning of the several clauses in this will; for it provides, in case she should not marry such a person as is before described, that she should have but a moiety for

life, and trustees are appointed to preserve contingent remainders; none of which are injoined in case she should marry a Protestant of the Church of England; which shows a difference was intended in case of performance and non-performance of the condition. Then considering it as a legal devise, no doubt but that a devise to one and the issue of his body will make an estate tail; and so it was held in the case of *King* v. *Melling*, 1 Vent. 214, 225, notwithstanding the proviso there, empowering the devisee to make a jointure; so if in this case the land itself had been devised to the Lady Glenorchy, it would have made an entail at law; and there is no difference between an entail of a legal estate and of an equitable one. *Wild's Case*, 6 Co. 16, devise to a man and his children, who had then two children alive, the devisee took but for life; but in *King* v. *Melling*, 1 Vent. 214, 225, Lord *Hale* said, that had there been no children living, in that case of *Wild*, it would have been an estate tail; though children be not so strong a word as issue; which in many statutes, particularly the Statute de Donis (13 Edw. I.), takes in all the children. In *Shelley's Case*, 1 Co. 88 b (L. Cas. R. Prop. 507, 2nd ed.), it is said, that if there be a gift to one for life, be it by deed or will, and afterwards comes a gift to the heirs of his body, it is an entail; otherwise indeed, if the limitation be to the heirs male of such heir male, as in *Archer's Case*, 1 Co. 66, there it would make but an estate for life; because the limitation there is grafted upon the word "heirs." So, in the case of *Backhouse* v. *Wells*, in B. R. 1712, 1 Abr. Eq. Ca. 184, the devisee took but for life, the limitation being there grafted upon the word "issue;" which for that reason was taken to be only a description of the person in that case; but in *Cosen's Case*, Owen, 29, and in *Langley* v. *Baldwin*, 1 Abr. Eq. Ca. 185, the estate tail was raised by implication; which shews that an estate tail may pass not only by express words but by implication also. In *King* v. *Melling*, the Lord *Hale* said upon *Wild's Case*, "That had it been to the children of the body, it would have passed an entail;" and yet none of those cases seem so

strong as the present. So, in the case of *Cook* v. *Cook*, 2 Vern. 545, it is said, "That a devise to one and his children, if there be no children living, will be an estate tail."

The exception of waste is next to be considered; and had it not been for that, this would clearly have passed an entail; but this exception varies not the case, for here the estates must disjoin according to *Lewis Bowles's Case*, 11 Co. 79 b (L. Cas. R. Prop. 27, 2nd ed.), to let in the husband's estate, which must intervene between her estate and that of her issue; and the power of committing waste (*voluntary waste in houses excepted*), was given only to make her dispunishable of waste during the time she should be tenant for life only; which she must be until her husband's death, by reason of the remainder to him, but not at all to restrain the estate, which the words of the will give her, which is plainly an estate tail. The adding the words, "*without impeachment of waste*," can alter nothing; for if she was tenant in tail, she had already in her that power which these words would give her; and the expressing the power which was already in her could no more abridge her estate (according to the maxim of *Expressio eorum quæ tacitè insunt nil operatur*), than the power of making the jointure did in *King* and *Melling's Case*. In *Langley* v. *Baldwin* there were the same words as here; and in that of *Shaw* and *Weigh*, or *Sparrow* v. *Shaw* (*a*), 1 Abr. Eq. Ca. 184, which went up to the House of Lords, the prohibition went not only to voluntary but to all manner of waste, and yet there it was decreed to be an estate tail; which was a much stronger implication to make the sister to be but tenant for life than any in the present case. And in *Baile* v. *Coleman*, 2 Vern. 670, an estate tail was decreed by the Lord *Harcourt*, notwithstanding the power of leasing given to Christopher Baile. Nor can the other words *voluntary waste in houses excepted*, carry the implication further than the former; since this Court will often restrain a tenant for life without impeachment of waste, from committing waste, notwithstanding his power, as was declared by the Earl of *Nottingham* in *Williams* v. *Day*,

(*a*) 3 Bro. P. C. 120, Toml. ed.

2 Ch. Ca. 32, who there said, that he would stop the pulling down of houses or defacing a seat by tenant in tail after possibility of issue extinct, or by tenant for life, though dispunishable of waste by express grant or by trust; and the like has been since done in the case of *Vane* v. *Lord Barnard*, 2 Vern. 733. By comparing this with the other clauses of this will, it appears plainly that the testator did not intend the Lady Glenorchy a less estate than to the other devisees; but that his design was to prefer her and her issue to that of Mrs. Frances Ireland, though Frances was dead at the time of the will; and that her son, who could expect no more favour than his mother could, had she been living, should not have an immediate estate tail, and so a greater estate than she who was intended to be most preferred. It is plain the testator well knew the difference between giving an estate for life and an estate tail, by the different wording of the clauses of this will. In that, whereby he devises the remainder to Mr. Bosville, these words are purposely omitted; and in others he gives the Lady Glenorchy several estates, according to her marrying such or such persons, Protestants or Papists; and, consequently, he must be thought to have intended her a greater estate upon her performing than upon her not performing the condition. If, therefore, these words would create an estate tail at law, the construction will be the same here, since a Court of equity ought not to go further than the Courts of law; as was held by Lord *Cowper* in the case of *Legatt* v. *Sewell*, 2 Vern. 551, 1 Abr. Eq. Ca. 394, and was also held by Lord *Harcourt* in the case of *Baile* v. *Coleman*, 2 Vern. 670, where he takes a difference between cases arising upon wills and cases arising upon marriage articles, where the persons being all purchasers, the agreement is to be carried into stricter execution than in the case of a will, where, the parties being but volunteers, the words must be taken as you find them. The same is held totidem verbis in the case of *Sweetapple* v. *Bindon*, 2 Vern. 536, where it is said "That in a devise, all being volunteers, the devisee's estate is not to be restrained, nor is there any argument to be

drawn from this being an executory trust, since the case of *Baile* v. *Coleman* was such, and looked upon as such by the Lords *Cowper* and *Harcourt;* and the case of *Leonard* v. *Earl* of *Sussex*, 2 Vern. 526, is widely different from ours, for there was an express injunction that it should be settled in such manner as that the sons should never have it in their power to bar the issue.

Argument for the defendant.

It was argued for the defendant by Mr. *Attorney-General*, Mr. *Verney*, and Mr. *Fazakerley*, that the Lady Glenorchy could take but an estate for life; and they took a difference between the present case, being of an executory trust, and those of *Cosen's*, and of *Cook* v. *Cook*, which were legal estates and executed. The resolution in *Sonday's Case*, 9 Co. 127 b (which was likewise of a legal estate) was chiefly founded upon the proviso, restraining the son or his issue from aliening, which made the argument that he was intended by the testator to be tenant in tail, since, if he had been but tenant for life, the restraint had been vain and needless. In the case of *Langley* v. *Baldwin*, an estate tail was raised by implication upon the words, "if he die without issue male;" because the devise extending no further than the sixth son, no son born after could have taken; but the heir-at-law must have been preferred; whereas his intent was to provide equally for all his sons, and, therefore, the raising an estate tail by implication (besides that it was in the case of a legal estate) was carrying the testator's intent into execution. The case of *King* v. *Melling* has, indeed, gone very far, but has always been looked upon as the ne plus ultra, beyond which no Court would ever go. This appears from the resolution in the case of *Backhouse* v. *Wells*, where the intent of the parties prevailed against the doctrine now insisted on. But it is said, the word *issue* is always a word of limitation. In that of *Sweetapple* v. *Bindon*, the words did of themselves carry an estate tail, and there was no intent appearing to the contrary. And in *Legatt* v. *Sewell*, one judge was of opinion it was but an estate for life, and that case was afterwards agreed.

The difference which was insisted on in the former

argument, and is still strongly relied on for the defendant, between legal estates and trusts executed, and trusts executory, is evident, and appears plainly from the case of *Leonard* v. *Earl of Sussex*, where the words were much stronger to create an estate tail than they are here; but yet, in that case, the Court declared, that, it being a trust executory, the provision should be looked upon as strong for the benefit of the issue, as if it had been in marriage articles; and that the testator's intent (appearing by the subsequent words), "*that none should have power to dock the entail*" should be observed, therefore decreed but an estate for life. This difference appears likewise from the cases of *White* v. *Thornborough*, 2 Vern. 702, and *Trevor* v. *Trevor*, Eq. Ca. Ab. 387, and from that of *Papillon* v. *Voice*, Hil. 5 Geo. 2, which is not distinguishable from our case, except that there were trustees appointed in that case to preserve contingent remainders, which are not in this. But notwithstanding that provision, the late Lord Chancellor (*a*) declared, in that case, that the limitation, had it been by act executed, would have created an estate tail; but that the trust being executory, and to be carried into execution by the assistance of this Court, he would keep the parties to the observance of the testator's intent, which plainly governs the present case; and by all those it appears that the testator's intent is as much to be observed in cases of executory devises as of marriage articles. If, therefore, the testator's intent is to be observed, and that no words which may have any operation are to be rejected, it plainly appears from this and the other clauses of this will, that Sir Thomas Pershall intended this lady only an estate for life. It is true, indeed, that the word "*issue*" in a will is generally a word of limitation, and creates an estate tail; but that is only where no intent appears to control it. And in every clause of this will, where he intends only an estate for life, he mentions the words "*for life;*" and where he intends an estate tail, there is not a word mentioned of impeachment of waste, which shews he knew what he was doing when he inserted this exception, and was not

(*a*) King.

ignorant of the operation these words would have on the several estates. And these words were, in the case of *Loddington* v. *Kime*, 3 Lev. 431, taken to be a strong implication of the testator's meaning to give but an estate for life, notwithstanding the other words, which seemed to carry an entail. Nor is there any colour for what has been insisted on for the plaintiff, that the power of committing waste, with the restraint of voluntary waste in houses, was designed only to attend on her estate for life, till, by her husband's death, she should come to be tenant in tail, since no more could be meant by it than to restrain her from defacing or pulling down houses while she was in her husband's power, the testator not knowing who her husband might be. This power of committing waste has been compared to the power of leasing in the case of *Baile* v. *Coleman*, though they are widely different; nor can it be compared to that of making a jointure in *King* v. *Melling;* for, since tenant in tail cannot make a jointure without a recovery, the power was as proper to be annexed to an estate tail as to an estate for life, which was one of the reasons of Lord *Hale's* opinion in that case. In our case, to serve the intent of restraint of waste in houses, she must be decreed but an estate for life; if it be an estate tail, she will be enabled to commit waste in houses as well as in all the other parts of the estate, notwithstanding any restraint to the contrary. Nor will the answer that has been given to this, that she might be restrained in this Court, avail; since no instance can be shewn where a tenant in tail has been restrained from committing waste by injunction of this Court.

[*Lord Chancellor.*—That was refused in Mr. *Saville's* *Case*, of Yorkshire, who, being an infant, and tenant in tail in possession, in a very bad state of health, and not likely to live to full age, cut down by his guardian a great quantity of timber just before his death, to a very great value; the remainder-man applied here for an injunction to restrain him, but could not prevail.] See Moss. 224.

The other objection, that Sir Thomas Pershall could never intend the Lady Glenorchy a less estate than the

children of his other grand-daughter, Frances Ireland, turns rather against the plaintiff; for the testator's intent was to provide for the Lady Glenorchy's children preferably to those of Frances Ireland, and therefore he makes the lady herself but tenant for life, and her children tenants in tail. Nor is anything more common than to limit an estate for life only to the first taker, by which the intent of providing for children is better answered than if the first taker was made tenant in tail. Nor will there in this case follow the inconvenience that has been mentioned, by making the issue to be purchasers, viz., that the issue must take jointly, and take estates for life only; for if issue be nomen collectivum, as has been insisted for the plaintiffs, why may it not be so as well where they take by purchase, as where they take by limitation? especially where the testator's intent, that they should take successively, and by seniority of birth, is as well served by their taking one way as the other. And if the word *issue* be tantamount to the word *heirs*, as it has been agreed to be, they have answered themselves. In the case of *Burchett* v. *Durdant*, 2 Vent. 311, and in 2 Lev. 232, by the name of *James* v. *Richardson*, the words, "*heirs of the body*," were held to be words of purchase, by reason of the words "*now living*," which came just after, and yet were at the same time determined to carry an estate tail, the word "*heirs*" being nomen collectivum; and if so, in case of a legal estate executed, much more ought this construction to hold here; this will being meant by the testator only as heads of a settlement to be made, and so may well be thought not to have been so accurate in the wording as if the conveyance were then to have been drawn up with advice of counsel, and all other assistances to make it formal.

Lord Chancellor Talbot.—Several observations have been made on the different penning of the several clauses of this will, from which I think no inference can be drawn; the testator having expressed himself variously in many, if not in all of them. It is plain, that by the

first part of this will he intended her but an estate for life till marriage; then comes the clause upon which the question depends. But before I give my opinion of that, I must observe, that the trustee has not done right; for nothing was to vest till after her marrying a Protestant. The trustee therefore by conveying, and enabling her to suffer a recovery before marriage, which has been done accordingly, has done wrong.

Construction of the devise assuming it to be legal and executed.

But the great question is, what estate she shall take? And *first*, considering it as a legal devise executed, it is plain that the first limitation, with the power and restriction, carries an estate for life only; so likewise of the remainder to the husband: But then come the words "*remainder to the issue of her body*," upon which the question arises. The word "*issue*," does, ex vi termini, comprehend all the issue; but sometimes a testator may not intend it in so large a sense, as where there are children alive, &c. That it may be a word of purchase is clear, from the case of *Backhouse* v. *Wells*, and of limitation, by that of *King* v. *Melling*; but that it may be both in the same will has not nor can be proved. The word "*heirs*," is naturally a word of limitation; and when some other words expressing the testator's intent are added, it may be looked on as a word both of limitation and purchase in the same will; but should the word "*issue*," be looked upon as both, in the same will, what a confusion would it breed; for the moment any issue was born, or any issue of that issue, they would all take. The question then will be, whether Sir Thomas Pershall intended the Lady Glenorchy's issue to take by descent or by purchase? If by purchase, they can take but for life, and so every issue of that issue will take for life; which will make a succession ad infinitum, a perpetuity of estates for life. This inconvenience was the reason of Lord *Hale's* opinion in *King* v. *Melling*, that the limitation there created an estate tail. It may be, the testator's intent is by this construction rendered a little precarious; but that is from the power of the law over men's estates, and to prevent confusion. Restraint

from waste has been annexed to estates for life, which have been afterwards construed to be estates tail. I do not say that where an express estate tail is devised, that the annexing a power inconsistent with it, will defeat the estate: No, the power shall be void. But there the power is annexed to the estate for life, which she took first; and therefore I am rather inclined to think it stronger than *King* v. *Melling*, where there was no mediate estate, as there is here to the husband; there, there was an immediate devise, here a mediate one; so the applying this power to the estate for life, carries no incongruity with it. As the estate of *King* v. *Melling* has never been shaken, and that of *Shaw* v. *Weigh*, or *Sparrow* v. *Shaw*, which went up to the House of Lords, was stronger, I do not think that Courts of equity ought to go otherwise than the Courts of law; and therefore am inclinable to think it an estate tail as it would be at law.

Construction of the devise, it being executory.

But there is another question, viz., How far in cases of trusts executory, as this is, the testator's estate is to prevail over the strength and legal signification of the words? I repeat it, I think, *in cases of trusts executed or immediate devises, the construction of the Courts of law and equity ought to be the same; for, there the testator does not suppose any other conveyance will be made; But in executory trusts he leaves somewhat to be done; the trusts to be executed in a more careful and more accurate manner.* The case of *Leonard* v. *The Earl of Sussex*, had it been by act executed, would have been an estate tail, and the restraint had been void; but *being an executory trust, the Court decreed according to the intent as it was found expressed in the will, which must now govern our construction.* And though all parties claiming under this will are volunteers, yet are they entitled to the aid of this Court to direct their trustees. I have already said what I should incline to, if this was an immediate devise; but as it is executory, and that such construction may be made as that the issue may take without any of the inconveniences which were the foundation of the

resolution in *King* v. *Melling's Case*, and that as the testator's intent is plain that the issue should take, the conveyance, by being in the common form, viz., to the Lady Glenorchy for life, remainder to her husband the Lord Glenorchy for life, remainder to their first and every other son, with a remainder to the daughters, will best serve the testator's intent. In the case of *Earl of Stamford* v. *Sir John Hobart*, Dec. 19, 1709, it appeared that, for want of trustees to preserve the contingent remainders, all the uses intended in the will and in the Act of Parliament to take effect, might have been avoided; and therefore the Lord *Cowper* did, notwithstanding the words of the Act, upon great deliberation, insert trustees. In the case of *Legatt* v. *Sewell*, the words, if in a settlement, would have made an estate tail; and in that of *Baile* v. *Coleman*, the execution was to be of the same estate as he had in the trust, which in construction of law was an estate tail. Nor is the rule generally true, that in articles and executory trusts different constructions are to be admitted; the late case of *Papillon* v. *Voice* is directly against this; and it seems to me a very strong authority for executing the intent in the one case as well as the other.

And so decreed the Lady Glenorchy but an estate for life, with remainder, &c.

LEGG *v.* GOLDWIRE.

[REPORTED CAS. TEMP. TALBOT, 20.]

[*Nov.* 10*th*, 1736.]

N.B. By LORD CHANCELLOR TALBOT.—Where articles are entered into before marriage, and a settlement is made *after* marriage different from those articles (as if by articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail, whereby he hath it in his power to bar the issue), this Court will set up the articles against the settlement; but where both articles and settlement are *previous* to the

marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and shall control the articles (*a*). And although, in the case of *West* v. *Errissey* (*b*), Mich. 1726, in the Court of Exchequer, and afterwards in the House of Lords, in 1727, the articles were made to control the settlement made before marriage, yet that resolution no way contradicts the general rule; for in that case the settlement was expressly mentioned to be made in *pursuance and performance of the said marriage articles*, whereby the intent appeared to be still the same as it was at the making of the articles.

(*a*) See, however, *Bold* v. *Hutchinson*, 5 De G. Mac. & G. 558, 567.

(*b*) 2 P. Wms. 349; 3 Bro. P. C. 327; Collectanea, Jur. 463.

"*Lord Glenorchy* v. *Bosville*, in Lord *Talbot's* time," observes Lord *Hardwicke*, "has established the distinction between trusts executed and executory:" *Bayshaw* v. *Spencer*, 2 Atk. 582: His Lordship, however, in the same case, almost denied that any such distinction existed, although he afterwards fully admitted it (see *Exel* v. *Wallace*, 2 Ves. 323; *Bastard* v. *Proby*, 2 Cox, 8; and it has since been recognised by a long series of decisions. See *Austen* v. *Taylor*, 1 Eden, 367, 368; *Countess of Lincoln* v. *Duke of Newcastle*, 12 Ves. 227; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 570; *Blackburn* v. *Stables*, 2 V. & B. 369; *Lord Deerhurst* v. *Duke of St. Albans*, 5 Madd. 233; S. C., nom. *Tollemache* v. *Coventry*, 2 C. & F. 611; *Douglas* v. *Congreve*, 1 Beav. 59; S. C., 4 Bing. N. C. 1, 5 Bing. N. C. 318; *Boswell* v. *Dillon*, 1 Dru. 297. See also *Earl of Stamford* v. *Sir John Hobart*, 3 Bro. P. C. 33, Toml. ed. *Papillon* v. *Voice*, 2 P. Wms. 471; *Dillon* v. *Blake*, 16 Ir. Ch. Rep. 24.

It is proposed in this note to consider the distinction between trusts *executed* and *executory*, and the consequences which result from it with reference to the limitation of estates.

A trust is said to be *executed* when no act is necessary to be done to give effect to it, the limitation being originally complete, as where an estate is conveyed or devised unto and to the use of A. and his heirs in trust for B. and the heirs of his body.

A trust is said to be *executory* where some further act is necessary to be done by the author of the trust or the trustees, to give effect to it, as in the case of marriage articles, and as in the case of a will where property is vested

in trustees in trust to *settle* or *convey* in a more perfect and accurate manner; in both of which cases a further act, viz., a settlement or conveyance, is contemplated.

It is now clearly established, as laid down by Lord *Talbot* in *Lord Glenorchy* v. *Bosville*, that a Court of equity in cases of *executed trusts* will construe the limitations in the same manner as similar legal limitations. If, for instance, an estate is vested in trustees and their heirs in trust for A. for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of A.'s body, the trust being an executed trust, A., according to the rule in *Shelley's case*, which is a rule of law, will be held to take an estate tail; see *Wright* v. *Pearson*, 1 Eden, 119; *Austen* v. *Taylor*, 1 Eden, 361; *Jones* v. *Morgan*, 1 Bro. C. C. 206; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559; clearly overruling the opinion expressed by Lord *Hardwicke* in *Bagshaw* v. *Spencer*, 2 Atk. 577, when he erroneously reversed the decision of Sir *Joseph Jekyll*, M. R. See also *Boswell* v. *Dillon*, 1 Dru. 291.

In cases, however, of *executory trusts*, where, according to Lord *Talbot's* observation in *Lord Glenorchy* v. *Bosville*, *something is left to be done, viz., the trusts are left to be executed in a more careful and more accurate manner*, a Court of equity is not, as in cases of *executed trusts*, bound to construe technical expressions with legal strictness, but will mould the trusts according to the intent of those who create them.

A mere direction, however, *to convey*, upon certain trusts, will not render those trusts executory, in the sense in which the word is used in this note, if the author of the trust has, as it were, taken upon himself to be his own conveyancer, and, instead of leaving anything to be done beyond the mere execution of a conveyance, has defined what the trusts or limitations are to be in accurate and technical terms. "All trusts," observes Lord *St. Leonards*, "are in a sense executory, because a trust cannot be executed except by conveyance, and therefore there is something always to be done. But that is not the sense which a court of equity puts upon the term 'executory trust.' A Court of equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner:—Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the Court to make out, from *general expressions*, what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates?" *Egerton* v. *Earl of Brownlow*, 4 Ho. L. Cas.

210, and see Ib. p. 49, 60, 61, 181, 88, 209; *Austen* v. *Taylor*, 1 Eden, Rep. 368, 367, 368; *Wight* v. *Leigh*, 15 Ves. 564, 568; *Graham* v. *Stewart*, 2 Macq. Ho. L. Cas. 295, 325; *Herbert* v. *Blunden*, 1 Dru. & Walsh, 78, 89, 91; *East* v. *Twyford*, 9 Hare, 713, 733, 4 Ho. L. Ca. 517; *Doncaster* v. *Doncaster*, 3 K. & J. 26; *Tatham* v. *Vernon*, 29 Beav. 604, 614; *Osborn* v. *Bellman*, 2 Giff. 593; *Fullerton* v. *Martin*, 1 Drew. & Sm. 31; *De Haviland* v. *De Saumarez*, 14 W. R. (L. J.) 118; *Lees* v. *Lees*, 5 I. R. Eq. 549. *In re Whitty's Trust*, 9 I. R. Eq. 41. And though there is a direction by the testator to the trustees to correct any defect or incorrect expression in his will, and to form a settlement from what appears to them to be his meaning, it will not authorise any change in the limitations, *Stanley* v. *Stanley*, 16 Ves. 491, 511.

It is observed by Lord *Talbot*, in *Lord Glenorchy* v. *Bosville*, that the rule is not generally true, that in articles and executory trusts (meaning executory trusts in wills) different constructions are to be admitted. This is correct with the qualification or distinction that, in executory trusts under marriage articles, the intention of the parties may fairly be presumed *à priori* from the nature of the transaction; in executory trusts in wills, it must be gathered from the words of the will alone. Lord *Eldon* seems to have denied this distinction in *Countess of Lincoln* v. *Duke of Newcastle*, 12 Ves. 227, 230; but see his explanation in the case of *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 574. The distinction has been well put by Sir *William Grant*, M. R., in *Blackburn* v. *Stables*, 2 V. & B. 369: "I know," observes his Honor, "of no difference between an executory trust in marriage articles and in a will, *except* that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. When the object is to make a provision, by the settlement of an estate, for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention; but if a will directs a limitation for life, with remainder to the heirs of the body, the Court has no such ground for decreeing a strict settlement. A testator gives arbitrarily what estate he thinks fit; there is no presumption that he means one quantity of interest rather than another,—an estate for life rather than in tail or in fee. The subject being mere bounty, the intended

extent of that bounty can be known only from the words in which it is given; but, if it is clearly to be ascertained from anything in the will, that the testator did not mean to use the expressions which he has employed, in their strict, proper technical sense, the Court, in decreeing such settlement as he has directed, will depart from his words, in order to execute his intention." In *Lord Deerhurst* v. *Duke of St. Alban's*, 5 Madd. 260, Sir J. *Leach*, V. C., observes, as to the distinction between marriage articles and a will, "you are guided to the meaning of articles by the plain object of consideration in them, the issue of the marriage; but you know nothing of the motive and object of a will, but what you collect from the language of it." See also *Maguire* v. *Scully*, 2 Hog. 113; *Stratford* v. *Powell*, 1 Ball & B. 25; *Scarisbrick* v. *Lord Skelmersdale*, 4 Y. & C. Exc. Ca. 117; *Coape* v. *Arnold*, 4 De G. M. & G. 585; *Sackville West* v. *Viscount Holmesdale*, 4 L. R. Ho. L. 543; *Viscount Holmesdale* v. *West*, 3 L. R. Eq. 474; *Magrath* v. *Morehead*, 12 L. R. Eq. 491.

In consequence of the distinction adverted to, it will be most convenient to consider executory trusts under marriage articles, and executory trusts under wills, separately.

1. *As to Executory Trusts under Marriage Articles.*]—If, in articles before marriage, for making a settlement of the real estate of either the intended husband or wife, it is agreed that the same shall be settled upon the *heirs of the body* or the issue of them or either of them, in such terms as would, if construed with legal strictness, according to the rule in *Shelley's case*, give *either* of them an estate tail, and enable either of them to defeat the provision for their issue, Courts of equity, considering the object of the articles, viz. to make a provision for the issue of the marriage, will, in conformity with the presumed intention of the parties, decree a settlement to be made upon the husband or wife for life only, with remainder to the issue of the marriage in tail, as purchasers. Thus, in *Trevor* v. *Trevor* (1 Eq. Ca. Abr. 387; S. C., 1 P. Wms. 622), A., in consideration of an intended marriage, covenanted with trustees to settle an estate to the use of himself for life, without impeachment of waste, remainder to his intended wife for life, remainder to the use of the heirs males of him on her body to be begotten, and the heirs males of such heirs males issuing, remainder to the right heirs of the said A. for ever, Lord *Macclesfield* said, that upon articles the case was stronger than on a will; that articles were only minutes or heads of the agreement of the parties, and ought to be so modelled, when they came to be

carried into execution, as to make them effectual; that the intention was to give A. only an estate for life; that, if it had been otherwise, the settlement would have been vain and ineffectual, and it would have been in A.'s power, as soon as the articles were made, to have destroyed them. And his Lordship therefore held, that A. was entitled to an estate for life only, and that his eldest son took by purchase as tenant in tail. This decision was affirmed on appeal in the House of Lords; 5 Bro. P. C., Toml. ed., 122. In *Streatfield* v. *Streatfield*, Ca. t. Talb. 176 (selected as a leading case on another point), T. S., by articles, agreed to settle lands to the use of himself and M. his intended wife, for their lives and the life of the survivor; and after the survivor's decease, to the use of the heirs of the body of him the said T. S., on his wife begotten, with other remainders over. After marriage, by a deed reciting the articles, he settled the lands to the use of himself and his wife for their lives and the life of the longest liver of them, without impeachment of waste during the life of T. S.; and after their decease, to the use of the heirs of the body of the said T. S. on the said M. to be begotten; and for want of such issue, to the right heirs of T. S. Lord *Talbot* held, that the settlement was not a proper execution of the articles, and said that it could not be doubted, but that, upon application to the Court for carrying the articles into execution, it would have decreed it to be done in the strictest manner, and would never leave it in the husband's power to defeat and annul everything he had been doing; and that the nature of the provision was strong enough, without express words. See also *Jones* v. *Laughton*, 1 Eq. Ca. Abr. 392; *Cusack* v. *Cusack*, 5 Bro. P. C., Toml. ed., 116; *Griffith* v. *Buckle*, 2 Vern. 13; *Stonor* v. *Curwen*, 5 Sim. 268, 269; *Davies* v. *Davies*, 4 Beav. 54; *Lambert* v. *Peyton*, 8 Ho. Lo. Ca. 1; *In re Grier's estate*, 6 I. R. Eq. 1 S. C. nom. *Grier* v. *Grier*, 5 L. R. Ho. Lo. 688.

Where in marriage articles the words "heirs of the body," or "issue," are held to indicate an intention that the issue of the marriage should take as purchasers, a settlement will be decreed in favour of daughters as well as sons, viz. on first and other sons successively in tail, with remainder to the daughters as tenants in common in tail, with cross remainders between them: *Nandick* v. *Wilkes*, Gilb. Eq. Rep. 114; S. C. 1 Eq. Ca. Abr. 393, c. 5; *Burton* v. *Hastings*, Gilb. Eq. Rep. 113; S. C. 1 Eq. Ca. Abr. 393; *Hart* v. *Middlehurst*, 3 Atk. 371; *Marryat* v. *Townly*, 1 Ves. 105; *Maguire* v. *Scully*, 2 Hog. 113; S. C., 1 Beat. 370; *Burnaby* v. *Griffin*, 3 Ves. 206; *Horne* v. *Barton*, 19 Ves. 398, Coop. 257, S. C.,

on an application for a rehearing, 26 L. J. N. S. (Ch.) 225; *Phillips* v. *James*, 2 D. & Sm. 404, 408, 13 W. R. (L. J.) 934. *In re Grier's estate*, 6 I. R. Eq. 1, 11; S. C. nom. *Grier* v. *Grier*, 5 L. R. Ho. Lo. 688.

In *Rossiter* v. *Rossiter*, 14 Ir. Ch. Rep. 247, the husband agreed to convey to trustees for himself for life, and if his wife survived, to the use of the "wife and children," if no child, to the wife in fee. A settlement upon the wife for life, with remainder to the children, was decreed, *Wild's Case* (6 Co. 16) being held inapplicable to marriage articles.

Where it is agreed to settle real estate to the use of the intended husband for life, remainder to the heirs male of his body, remainder to the *heirs female* of his body, the words "heirs female" will be held to mean daughters of the marriage, and a settlement will be made upon them as tenants in common in tail, with cross remainders between them: *West* v. *Errissey*, 2 P. Wms. 349, Comyn's Rep. 412, 1 Bro. P. C., Toml. ed., 225.

A limitation, however, to the heirs of the body, following after a remainder to the first and other sons of the marriage in tail male, and a remainder to heirs male generally, will not, it seems, be so construed in favour of the daughters of the marriage, especially where portions are by the articles expressly provided for them: *Powell* v. *Price*, 2 P. Wms. 535.

The principle upon which Courts of equity, in such cases as have been considered, decree a strict settlement, seems to be this, viz. to give effect to the presumed intention of the parties to the articles, to make such a provision for the issue of the marriage as it would not be in the power of *either* parent to defeat; where, however, articles are so framed that the concurrence of *both* parents is requisite, in order to defeat the provision for the issue, the same principle does not apply, as it might have been the intention of the parties to the articles, that the husband and wife should *jointly* have such power. Thus, where the husband has by articles agreed to settle *his own property* upon himself for life, remainder to his wife for life, with remainder to the heirs of the body of the wife by him, as she would in this case be tenant in tail *ex provisione viri*, and consequently could not, by reason of the Statute of Jointures (11 Hen. 7, c. 20), if the property were settled upon her previous to the passing of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), bar the entail without the concurrence of her husband, a settlement making the issue take by purchase would not be decreed: *Whately* v. *Kemp*, cited in *Howel* v. *Howel*, 2 Ves. 358; *Honor* v. *Honor*, 1 P. Wms. 123; *Green* v. *Ekins*, 2 Atk. 477; *Highway* v. *Banner*, 1 Bro.

C. C. 584; *Sackville West* v. *Viscount Holmesdale*, 4 L. R. Ho. Lo. 554. As, however, the statute 11 Hen. 7, c. 20, has been repealed as to estates tail *ex provisione viri* by 3 & 4 Will. 4, c. 74, s. 16, this exception from the general rule will cease to be part of the law: *Rochford* v. *Fitzmaurice*, 2 D. & W. 19.

So, also, where it appears on the face of the articles that the parties themselves knew and made a distinction between limitations in strict settlement, and limitations leaving it in the power of *one* of the parents to bar the issue, a strict settlement will not be decreed. Thus, where by articles part of an estate was limited to the husband for life, remainder to the wife for life, remainder to the first and every other son and daughters in tail, and another part to the husband for life and the heirs male of his body by that wife, Lord *Macclesfield* said, that if the latter had been the sole limitation, he should without scruple decree in strict settlement, according to the common rule; but where the parties had shown they knew the distinction when to put it out of the power of the father, and when to leave it in his power, he would not vary the last limitation decreeing to the father in tail as to the last, though not as to the first: *Anon.*, cited 2 Ves. 359; *Howel* v. *Howel*, 2 Ves. 358; *Powell* v. *Price*, 2 P. Wms. 535; *Chambers* v. *Chambers*, Fitzg. Rep. 127; S. C., Mos. 333, 2 Eq. Ca. Abr. 35, c. 4; *Highway* v. *Banner*, 1 Bro. C. C. 584.

When articles direct personal property of the wife to be settled upon trust for the husband and wife "during their lives," they will be carried into effect by giving the wife the first life interest to her separate use: *Cogan* v. *Duffield*, 20 L. R. Eq. 789; 2 Ch. D. 44.

A very good example of the mode in which the Court will carry out informal marriage articles of the intended wife's personal property is to be found in *Cogan* v. *Duffield*, 2 Ch. D. 44.

Where words in articles for a settlement would, if interpreted in their strict legal sense, create a joint-tenancy among the children of the marriage, equity will decree a settlement upon them as tenants in common, either with provisions for limiting over the shares of any who died under age and without issue (*Taggart* v. *Taggart*, 1 S. & L. 89), or for making the interests of the children contingent on their attaining twenty-one being sons, or being daughters attaining that age or marrying: *Young* v. *Macintosh*, 13 Sim. 445; *Cogan* v. *Duffield*, 2 Ch. D. 44, 50. The reason given by Lord *Redesdale* for preferring a tenancy in common is that a joint tenancy as a provision for the children of a marriage is an inconvenient mode of settlement, because during their minorities no use can be made of

their portions for their advancement, as the joint-tenancy cannot be severed: *Taggart* v. *Taggart*, 1 S. & L. 88. See also *Mayn* v. *Mayn*, 5 L. R. Eq. 150; *Liddard* v. *Liddard*, 28 Beav. 266; but see *In re Bellasis' Trust*, 12 L. R. Eq. 218.

And it has been laid down that executory trusts in postnuptial settlements will receive the same construction as executory trusts in wills: *Rochford* v. *Fitzmaurice*, 1 C. & L. 158, 172, 173.

Where, by a postnuptial agreement, a settlement was directed to be made upon a son of the marriage and his issue, it was held that the same considerations did not apply as in the case of a similar limitation to an intended husband and his issue by articles before marriage, so as to cut down the interest of the son to a life interest. See *Dillon* v. *Blake*, 16 Ir. Ch. Rep. 24, there by executory articles for valuable consideration, made between H. Blake and his wife and sons, it was agreed that after the death of H. Blake, his estates should be limited to and settled upon B., his eldest son *and his issue*, with remainder, in the *event of B. dying in the lifetime* of H. Blake, without lawful issue, to each of the other sons of H. Blake, in succession, according to their seniority, with an ultimate remainder to the right heirs of H. Blake. And power was given to the trustees to lease any part of the lands, with the concurrence of H. Blake. B. survived H. Blake, and had issue. It was held by the Lord Chancellor of Ireland (*Blackburne*), in a suit to carry these articles into execution, that B. was entitled to an estate tail in possession, with remainder to him in fee.

Covenant to settle chattels on the same trusts as realty.] Where chattels are settled *immediately* or by a *trust executed* upon the same trusts as have been declared of real estate in strict settlement, viz., upon first and other sons successively in tail, if there is no restriction as to the attainment of twenty-one years or the fulfilment of any other condition, such chattels will vest absolutely in the first tenant in tail at his birth, whether the limitation of the chattels be expressed in extenso, or created by reference to the limitations of the realty (*Doncaster* v. *Doncaster*, 3 K. & J. 26), and such reference may be effectually made either by declaring that the chattels are to go upon the limitations of the realty or by saying that they are to be treated as heir looms: *Lord Scarsdale* v. *Curzon*, 1 J. & H. 40. See *In re Johnson's Trusts*, 2 L. R. Eq. 716.

This result is prevented in well-drawn settlements by a clause in clear words suspending the vesting of the chattels in the first tenant, "unless he should attain the age of twenty-one years," or "unless he should die under twenty-one years leaving issue."

(And see other forms suggested in Davidson by Waley, vol. iii. p. 497, and the note, vol. iv. p. 379, with reference to *Gosling* v. *Gosling*, 1 De G. J. & S. 1; S. C. nom. *Christie* v. *Gosling*, 1 L. R. Ho. Lo. 279.)

In cases, however, of *executed trusts*, doubtful words tending to restrict the interests of chattels to those who come into the possession of the realty, will not overrule the operation of the general canons of construction, nor suspend the interest until possession of the realty is acquired: *Lord Scarsdale* v. *Curzon*, 1 J. & H. 40. *Johnson's Trusts*, 2 L. R. Eq. 716.

In the case of an *executory trust* by settlement, as where a person has agreed or covenanted to settle chattels upon similar trusts to real estate in strict settlement, a Court of equity, upon the principle of carrying into effect the intent of the parties as far as possible, will order a clause to be inserted in the settlement of the chattels—that the tenant in tail should not under the limitations be entitled to the absolute property in the chattels "unless he should attain the age of twenty-one years," or "unless he should die under twenty-one, leaving issue." See *Duke of Newcastle* v. *Countess of Lincoln*, 3 Ves. 387, in which case there was a covenant in a marriage settlement to settle leaseholds in trust for such persons and for such or the like ends, intents, and purposes, *as far as the law in that case would allow and permit*, as were declared concerning certain real estates which were limited to A. for life, remainder to his first and other sons in tail male, remainder to B. for life, remainder to B.'s first and other sons in tail male, remainders over. A. died, leaving a son who lived only nine months. Lord *Loughborough* stated it to be his decided opinion, that in cases of marriage articles, where leasehold property was covenanted to be settled upon the same limitations as freehold estate and the limitations of the freehold estate were to all the sons successively in tail, the settlement to be made of the leaseholds ought to be analogous to that of the freeholds, so that no child born and not attaining twenty-one should by his birth attain a vested interest to transmit to his representatives, and thereby defeat the ulterior object of the articles, which were not in favour of one son, but equally extended to every son; and his Lordship (admitting the law as laid down in *Vaughan* v. *Burslem*, 3 Bro. C. C. 101, to be applicable to wills) observed that "it is not true that you are to do for the testator all that can be done by law. You are to do for the testator no more than what he has intended to be done, and according to the common acceptation of the words. But," said his Lordship, "I wish to put it to you, whether in the

nature of things there is not a radical and essential difference between marriage settlements and wills? The parties contract upon a settlement for all the remainders. They are not voluntary, but within the consideration. The issue, then, are all purchasers. Suppose, then, a settlement to be made of freehold estate, and as to the leasehold there is only this article, that the settlement shall be analogous to that of the freehold; do I execute it and make a like settlement by giving an interest which cuts off all the issue? Suppose the whole subject was leasehold estate, and stood upon an article that it should be conveyed according to the limitations of an honour, and a bill was brought to carry that settlement into effect after a child had lived a day, should I permit the father to say it was his property? It is utterly impossible to make the identical settlement of the leasehold estate as of the freehold; but if I am to make it in analogy to the settlement of the freehold, shall I not carry it on to all the near events? and shall they fail because I cannot embrace all the remote events?" And his Lordship thought there was no objection to a proviso that no person should be entitled to the absolute property unless he should attain the age of twenty-one years, or die under that age leaving issue male. Upon an appeal to the House of Lords (reported 12 Ves. 218), a son of B.'s having in the meantime attained his majority, it was decreed that the leasehold estate vested absolutely in him; Lord *Ellenborough* and Lord *Erskine*, then Lord Chancellor, to this extent approving of the decree of Lord *Loughborough*, that the absolute interest did not vest in the first tenant in tail, A.'s son, on his birth; but it was unnecessary to decide what was the proper limitation to have been inserted in the settlement, whether a limitation over on "dying under twenty-one," or on "dying under twenty-one without issue male." Lord *Eldon*, however, denying the distinction between wills and marriage articles, expressed some dissatisfaction with the decree, and stated that he could not reconcile the decision with *Vaughan* v. *Burslem* (3 Bro. C. C. 101) and *Foley* v. *Burnell* (1 Bro. C. C. 274), decided by Lord *Thurlow*, although he did not move an amendment. The cases, however, of *Vaughan* v. *Burslem* and *Foley* v. *Burnell* are cases of wills; and Lord *Eldon* himself afterwards, in *Jervoise* v. *Duke of Northumberland*, fully admitted the distinction between executory trusts in marriage articles and wills: see 1 J. & W. 574.

It may be here mentioned, that although, properly speaking, a marriage settlement ought to be executed, in order to carry the executory provisions of marriage articles into effect, the Court has,

where the property was personal, at the request of the parties, in order to save expense, made a declaration as to the true meaning of the articles, upon which the parties were able to act, without causing a formal instrument to be prepared and executed: *Byam* v. *Byam*, 19 Beav. 58, 63.

2. *As to Executory Trusts in Wills.*]—The intention of the testator must appear from the will itself, that he meant "heirs of the body," or words of similar legal import, to be words of purchase; otherwise Courts of equity will direct a settlement to be made according to the strict legal construction of those words. Suppose, for instance, a devise to trustees in trust to convey to A. for life, and after his decease to the heirs of his body, or words tantamount to heirs of the body; as no indication of intention appears that the issue of A. should take as purchasers, the rule of law will prevail, and A. will take an estate tail, although, as we have already seen in the case of marriage articles similarly worded, he would take only as tenant for life. Thus, in *Sweetapple* v. *Bindon*, 2 Vern. 536, B. by will gave 300*l.* to her daughter Mary, to be laid out by her executrix in lands and settled to the only use of her daughter Mary and her children, and if she died without issue the land to be equally divided between her brothers and sisters then living; Lord *Cowper* said, that, had it been an immediate devise of land, Mary, the daughter, would have been, by the words of the will, tenant in tail: and in the case of a voluntary devise the Court must take it as they found it, and not lessen the estate or benefit of the legatee: although upon the like words in marriage articles it might be otherwise. See also *Legatt* v. *Sewell*, 2 Vern. 551; *Seale* v. *Seale*, 1 P. Wms. 290; *Harrison* v. *Naylor*, 2 Cox, 247; *Marshall* v. *Bousfield*, 2 Madd. 166; *Blackburn* v. *Stables*, 2 V. & B. 370; *Meure* v. *Meure*, 2 Atk. 266.

In the following cases, however, it has been held that there has been a sufficient indication of the testator's intention, that the words "heirs of the body," or words of similar import, should be considered as words of purchase and not of limitation, viz., where trustees were directed to settle an estate upon A. and the heirs of his body, taking *special care in such settlement that it should not be in the power of A. to dock the entail of the estate given to him during his life: Leonard* v. *Earl of Sussex*, 2 Vern. 526.

So in *Thompson* v. *Fisher*, 10 L. R. Eq. 207, a testator subject to the life interest of his widow, devised freehold property to trustees "upon trust to convey, assign and assure" the same "unto and to the use of his son, T. Fisher, and the heirs of his body lawfully issuing, but in such manner and

form nevertheless, and subject to such limitations and restrictions, as that if T. Fisher shall happen to die without leaving lawful issue, then that the property *may after his death descend unincumbered* unto and belong to his daughter, Ruth Fisher, her heirs, executors, administrators, and assigns." Sir *W. M. James*, V.-C., held that the devise was an executory trust to be executed by a conveyance to the use of T. Fisher during his life, with remainder to his first and other sons and daughters as purchasers in tail, with remainder to the testator's daughter Ruth in fee.

So, directions in a will that heirs of the body or issue shall take, "in *succession and priority* of birth," or that the settlement shall be made "*as counsel shall advise*," or "*as executors shall think fit*," have been held strongly to indicate an intention that an estate should be settled strictly: see *White* v. *Carter*, 2 Eden, 368; *Bastard* v. *Proby*, 2 Cox, 6; *Rochford* v. *Fitzmaurice*, 2 D. & W. 1; *Read* v. *Snell*, 2 Atk. 642; *Haddelsey* v. *Adams*, 22 Beav. 276.

So, where a testator directed trustees to convey an estate to his daughter for her life, and so as she alone, or such person as she should appoint, should take or receive the rents and profits thereof, and so that her husband should not intermeddle therewith, and from and after her decease in trust for the heirs of her body for ever; Lord *Hardwicke*, considering that it was plainly the intention of the testator that the husband should have no manner of benefit from the estate, either in the lifetime of his wife or after her decease, held, that the words "heirs of her body" were words of purchase, and that the wife was entitled to a life estate only; for had they been construed as words of limitation, and the wife had taken as tenant in tail, the husband, contrary to the intention of the testator, would have had considerable benefit from the estate as tenant by the curtesy: *Roberts* v. *Dixwell*, 1 Atk. 607; S. C. West's Rep. temp. Lord Hardwicke, 536; see also *Stonor* v. *Curwen*, 5 Sim. 264; *Parker* v. *Bolton*, 5 L. J. N. S. (Ch.) 98; *Shelton* v. *Watson*, 16 Sim. 542; *sed vide Samuel* v. *Samuel*, 14 L. J. N. S. (Ch.) 222; *Young* v. *Macintosh*, 13 Sim. 445; *Head* v. *Randall*, 2 Y. & C. C. C. 231.

Where a settlement is directed to be made upon a woman to her separate use, at the present day, a clause *against anticipation* will be added. See *Turner* v. *Sargent*, 17 Beav. 515, in which case a testator having directed that property should be settled upon his daughter, to the exclusion of her present or any future husband, that the same might belong to her during her life, "a settlement was directed in trust for the daughter for her life, to her separate use, without power of anticipation."

Stanley v. *Jackman*, 23 Beav. 450. *In re Dunnill's Trusts*, 6 I. R. Eq. 322.

Where a testator directed that his daughters' shares under his will should be "settled upon themselves strictly," it was held by Lord *Romilly*, M.R., that the income of each daughter's share should, during the joint lives of herself and her husband, be paid to her for life, to her separate use, without power of anticipation; and if she died in the life of her husband, then her share should go as she should by will appoint, and in default of appointment, to her next of kin, exclusively of her husband; and if she survived her husband, then to her absolutely: *Loch* v. *Bagley*, 4 L. R. Eq. 122. And where a father on his daughter's marriage simply agrees to give, or covenants to pay, a sum of money as her fortune, in making a settlement thereof the husband's marital right to the sum named would not be affected, save to the extent that it might be cut down by express contract in the agreement directing the settlement to be made: *Dennehy* v. *Delany*, 10 I. R. Eq. 377; *Ward* v. *Dyas*, Ll. & G. t. Sug. 177.

Where, however, a testator by his will directed his property to be divided into nine shares, and gave one and a half share to each of his two daughters, "to be settled on themselves at their marriage," and the two daughters, who were infants at the testator's death, having attained twenty-one, and being unmarried, it was held by *Bacon*, V.-C., that they were entitled to their shares absolutely, and that there was no trust for a settlement which the Court could execute: *Magrath* v. *Morehead*, 12 L. R. Eq. 491.

Where a testator, as in *Lord Glenorchy* v. *Bosville*, directs an estate to be conveyed to a person for life "*without impeachment of waste*," or to a person for life with a limitation to trustees "*to preserve contingent remainders*," he will be held sufficiently to have indicated his intention, that in a subsequent limitation to the issue or heirs of the body of the person to whom the life interest is given, such issue or heirs should take as purchasers, and a strict settlement will accordingly be directed: see *Papillon* v. *Voice*, 2 P. Wms. 471, in which case the distinction between executed and executory trusts in wills is most strikingly illustrated. There A. bequeathed a sum of money to trustees, in trust, to be laid out in a purchase of lands and *to be settled* on B. for life, *without impeachment of waste*, remainder to trustees and their heirs during the life of B. to *preserve contingent remainders*, remainder to the heirs of the body of B., remainder over, with power to B. to make a jointure; and by the same will A. *devised lands* to B. for his life, *without impeachment of waste*, remainder to trustees and their heirs during

the life of B. to *support contingent remainders*, remainder to the heirs of the body of B., remainder over: though it was decreed at the Rolls that an estate for life only passed to B., with remainder to the heirs of his body by purchase, as well in the lands devised as in those directed to be purchased, yet upon an appeal from this decree Lord Chancellor *King* declared as to that part of the case where lands were devised to B. for life, though said to be without impeachment of waste, with remainder to trustees to support contingent remainders, remainder to the heirs of the body of B., this last remainder was within the general rule, and must operate as words of limitation, and consequently create a vested estate tail in B., and that the breaking into this rule would occasion the utmost uncertainty; but, as to the other point, he declared the Court had a power over the money directed by the will to be invested in land, and that the diversity was where the will passed a legal estate and where it was only executory, and the party must come to the Court in order to have the benefit of the will; that in the latter case the intention should take place and not the rules of law, so that as to the lands to be purchased they should be limited to B. for life, with power to B. to make a jointure, remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail male successively, remainder over.

So, where a testator directed his estates and house property to be *settled* on his son, T. F. D., and his heirs male; and if he should have no heirs male, on his grandson, J. B., on his taking the name of D. in addition to his own, within twelve months after his succession; and in the event of his having no heirs male, then the estate to go to his brother, G. A. B., and his heirs male, he taking the name of D. It was held by the Master of the Rolls of Ireland that an executory trust was created which the Court directed to be carried out by a settlement with limitations to the several devisees for life, and with remainders to their sons in tail male successively: *Duncan* v. *Bluett*, 4 L. R. Eq. 469, see also *Parker* v. *Bolton*, 5 L. J. (N. S.) Ch. 98.

Where, however, the trusts and limitations of land to be purchased by trustees are expressly declared by the testator, it has been decided that the Court has no authority to make them different from what they would be at law. Thus, in *Austen* v. *Taylor*, 1 Eden, 361, land was devised to trustees in trust to pay an annuity; and subject thereto in trust for A. for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A., remainder to the testator's right

heirs: and the residue of the testator's personal estate was to be laid out in the purchase of lands which should thereafter remain, continue, and be, to, for, and upon such and the like estate or estates, uses, trusts, intents, and purposes, and under and subject to the like charges, restrictions, and limitations, as were by him before devised, limited, and declared of and concerning his lands and premises last before devised, or as near thereto as might be and the deaths of persons would admit. Lord *Northington* distinguished the case from *Papillon* v. *Voice*, on the ground that the testator refers no settlement to his trustees to complete, but declares his own uses and trusts, which being declared, he knew no instance where the Court had proceeded so far as to alter or change them; and he therefore held, that A. was entitled to an estate tail in the lands to be purchased: and see *East* v. *Twyford*, 9 Hare, 713, 733, 4 Ho. Lo. 517; *Franks* v. *Price*, 3 Beav. 182; *Rochford* v. *Fitzmaurice*, 1 C. & L. 172, 2 Dru. & Warr. 21; *Doncaster* v. *Doncaster*, 3 K. & J. 26. See, however, *Meure* v. *Meure*, 2 Atk. 265; *Harrison* v. *Naylor*, 2 Cox, 247; *Green* v. *Stephens*, 17 Ves. 76; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 572.

The word "issue," as observed by Lord *Talbot* in *Lord Glenorchy* v. *Bosville*, is both a word of purchase and of limitation: but the word "heirs" is naturally a word of limitation. In executory trusts in wills, therefore, it will be seen, upon examining the cases, that where the word "issue" is made use of, Courts of equity will more readily decree a strict settlement, than where the words "heirs of the body" have been used. See *Meure* v. *Meure*, 2 Atk. 265; *Ashton* v. *Ashton* (cited in *Bagshaw* v. *Spencer*), 1 Coll. Jur. 402; *Horne* v. *Barton*, Coop. 257; *Dodson* v. *Hay*, 3 Bro. C. C. 405; *Stonor* v. *Curwen*, 5 Sim. 264; *Crozier* v. *Crozier*, 2 C. & L. 311; *Haddelsey* v. *Adams*, 22 Beav. 266.

Wherever in executory trusts, in wills, the words "heirs of the body," or "issue," are construed as words of purchase, they will be held to include daughters as well as sons, and the settlement, as in *Lord Glenorchy* v. *Bosville*, will be decreed to be made in default of sons and their issue upon daughters, as tenants in common in tail general, with cross remainders between them: *Bastard* v. *Proby*, 2 Cox, 6. In *Trevor* v. *Trevor*, 13 Sim. 108, where a testator devised his estates to trustees, in trust, to settle and convey the same to the use of or in trust for G. R., who had then no issue, for life, without impeachment of waste, with remainder *to his issue in tail male in strict settlement*, Sir *L. Shadwell*, V.-C., held, that the estates ought to be settled upon G. R. for life, without impeachment of waste, with remainder to his sons succes-

sively in tail male, with remainder to his daughters as tenants in common in tail male with cross remainders in tail male. This decision was affirmed in the House of Lords: 1 H. L. Cas. 239. See also *Skelton* v. *Watson*, 16 Sim. 543; *Coape* v. *Arnold*, 2 Sm. & Giff. 311, 4 De G. Mac. & G. 574.

In *Turner* v. *Sargent*, 17 Beav. 515, the testator, after directing a settlement to be made of real and personal property upon his daughter for life, added, that it was "to be *secured* for the benefit of her children, if more than one, equally, after her death, so that the issue of any such child dying in his daughter's lifetime might take his or her parent's share, and in default of such children or other issue, then to his son W. absolutely." Sir *J. Romilly*, M.R., directed a settlement to be made according to which, after the decease of the daughter, the property was to be in trust for her children; but if any child died in her lifetime, leaving children or remoter issue who should be living at her death, such children or remoter issue should take the share of the child of the testator's daughter so dying, *per stirpes*, but *inter se*, as tenants in common, with limitations in the nature of cross remainders in favour of the children and issue who should survive the testator's daughter, as respected the share of any child dying in her lifetime without leaving issue, and as respected the share of any issue dying in her lifetime. And if no child of the testator's daughter or issue of any deceased child should be living at her decease, there was to be an ultimate trust for W., so that the death of the testator's daughter was the period or event at which the vesting of the property in the children's issue, or in the legatee and devisee over, was to be ascertained.

Although in the ordinary construction of a gift by will to a wife and children, they would take as joint tenants (*Nevill* v. *Nevill*, 7 L. R. Ch. App. 256, 257), where there has been a direction to "*secure*" the fund for the benefit of the wife and children, the Court has laid hold of the word "secure," as indicating an intention that the fund should be settled in the usual mode upon the wife for life, with remainder to her children, *Combe* v. *Hughes*, 14 L. R. Eq. 415, see also *Bustard* v. *Saunders*, 7 Beav. 92.

Whenever a strict settlement is decreed, limitations to trustees to preserve contingent remainders will if necessary be inserted: *Stamford* v. *Hobart*, 3 Bro. P. C. 31, Toml. ed., 1 Atk. 593; *Baskerville* v. *Baskerville*, 2 Atk. 279; *Harrison* v. *Naylor*, 2 Cox, 247; but since the passing of the Law of Property Amendment Act (8 & 9 Vict. c. 136), such limitations are in some cases unnecessary (see s. 8); but they may be use-

fully inserted, with the object of the trustees interposing to prevent wilful waste and destruction on the part of the tenant for life before any remainderman comes in esse. See *Garth* v. *Cotton*, and note post. Sometimes, moreover, when such settlement is decreed, the freehold will be vested in trustees, during the life of the tenant for life (*Woolmore* v. *Burrows*, 1 Sim. 512) : but the Court has refused to appoint a protector to the settlement; *Bankes* v. *Le Despencer*, 11 Sim. 508, 527.

For the manner in which a direction to *entail* real and personal estate will be carried into effect, see *Tennent* v. *Tennent*, 1 Dru. 161; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559; *Randall* v. *Daniel*, 24 Beav. 193; and see *Sealey* v. *Stawell*, 2 I. R. E. 326; 9 I. R. E. 499. As to an entail directed to be made of land in Scotland, see *Graham* v. *Stewart*, 2 Macq., H. L. Cas. 295; and as to the settlement to be made when estates are directed, as far as the law will permit, to be strictly settled so as to go with an ancient barony, see *Bankes* v. *Le Despencer*, 10 Sim. 577, 11 Sim. 508; or to go in a course of entail to correspond as nearly as may be with the limitations of a modern barony, the patent conferring which contained a shifting clause upon the holder of the barony becoming entitled to an earldom : *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. Ho. Lo. 543, reversing *Viscount Holmesdale* v. *West*, 3 L. R. Eq. 474; and see *Viscount Holmesdale* v. *West*, 12 L. R. Eq. 280; *Cope* v. *Earl de la Warr*, 8 L. R. Ch. App. 982.

Where real and personal property were by will directed to be settled upon the same trusts, the Court did not think itself authorised, through the medium of a trust for sale, to settle the real estate as personalty : *Turner* v. *Sargent*, 17 Beav. 515, 520.

Where in a will there are directions for a settlement, in terms which are ordinarily construed to create a joint tenancy, the Court has no authority, as in the case of marriage articles, with the same directions, to carry them out by giving a tenancy in common in the settlement, unless there is something to indicate that a tenancy in common was intended : *Marryat* v. *Townly*, 1 Ves. 102; *Synge* v. *Hales*, 2 Ball & B. 499.

As to the construction which will be put upon the word "family," in case of executory trusts in a will, see *White* v. *Briggs*, 2 Ph. 583. There a testator directed that after the death of his wife (to whom he gave a life interest in all his property both real and personal), his nephew, C. W., should "be considered heir to all his property not otherwise disposed of," and added, that "having had little intercourse with him, and being apprehensive that his habits required some control, he directed

that whatever portion of his property might thereafter be possessed by him, should be *secured by his executors for the benefit of his family;*" and he "urged upon his executors to consider it an indispensable obligation to secure his estate in the nature of a trusteeship for the parties who might be interested thereafter." It was held, by Lord *Cottenham*, C., that the real estate should be settled on the nephew for life, with remainder to his sons successively in tail male, with remainder to his daughters as tenants in common in fee; and that the personal estate should be settled upon the nephew for life, with remainder to all his children as joint tenants, with a proviso that, in the event of all the children dying under twenty-one, and in the case of daughters unmarried, and in the case of sons without lawful issue, the personalty should be held in trust for the nephew absolutely.

A direction to trustees to settle property upon a wife of the testator's son, should he marry, has been held in the absence of words indicating an intention to restrict the jointure to the wife of a first marriage, to authorise the settlement of a jointure upon the wife of a second marriage: *Mason* v. *Mason*, 5 I. R. Eq. 288.

Chattels directed by will to go in strict settlement.]—Where chattels are given by will, and are directed to go by reference to limitations of real estate in strict settlement, or to go as heirlooms, either simply or "as far as the rules of law and equity will permit," Courts of equity, even although the legal estate may be in executors, will not construe the trusts of the will as executory, and prevent the chattels vesting absolutely in the first tenant in tail upon his birth, as we have seen would be done in the case of marriage articles, by the insertion in the settlement of a clause, which would prevent the chattels vesting absolutely, unless the tenant in tail attained twenty-one years of age or died under that age leaving issue. See *Foley* v. *Burnell*, 1 Bro. C. C. 274; *Vaughan* v. *Burslem*, 2 Bro. C. C. 101; *Duke of Newcastle* v. *Countess of Lincoln*, 3 Ves. 387; *Carr* v. *Lord Erroll*, 14 Ves. 228; *Rowland* v. *Morgan*, 6 Hare, 463; affirmed on appeal, 2 Ph. 764, overruling *Gower* v. *Grosvenor*, Barn. Ch. Rep. 54; S. C., 5 Madd. 337; *Trafford* v. *Trafford*, 3 Atk. 347. See also *Doncaster* v. *Doncaster*, 3 K. & J. 26; *Evans* v. *Evans*, 17 Sim. 108; *Stapleton* v. *Stapleton*, 2 Sim. N. S. 212; and *Tollemache* v. *Coventry*, 2 C. & F. 611; S. C., 8 Bligh, N. S. 547; overruling *Lord Deerhurst* v. *Duke of St. Albans*, 5 Madd. 232; *Gosling* v. *Gosling*, 1 De G. J. & S. 1; 1 L. R. Ho. Lo. 279, nom. *Christie* v. *Gosling*; *In re Johnson's Trusts*, 2 L. R. Eq. 716; *Countess of Harrington* v.

Earl of Harrington, 5 L. R. Ho. Lo. 87.

But if a plain intention be expressed that no person shall take the chattels absolutely, who does not live to become entitled to the possession of the real estate, the Court must execute that intention: (*Potts* v. *Potts*, 3 J. & L. 353, 1 H. L. Cas. 671. See also *Trafford* v. *Trafford*, 3 Atk. 347;) *Foley* v. *Burnell*, 1 Bro. C. C. 101; *Lord Scarsdale* v. *Curzon*, 1 J. & H. 40; *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. Ho. Lo. 543. And the execution of a disentailing deed of the real estate by a tenant in tail who does not live to become entitled to the chattels, will not prevent their vesting in the person who would have been entitled to the real estate in possession if such disentailing deed had not been executed. Thus in *Hogg* v. *Jones*, 32 Beav. 45, a testator devised his freeholds to the first and other sons of A. (who was living and unmarried) successively in tail, with remainder to B. for life, with remainder to B.'s first and other sons successively in tail. And he bequeathed his plate to B. for life, and after his decease, he gave the same "in the nature of an heir-loom to the person who, for the time being, should be in the actual possession and enjoyment of his freehold estates *under the limitations of his will*." In the lifetime of A., B. and her eldest son executed a disentailing deed. A. survived both B. and her eldest son, and he died without having been married. At A.'s death, C. was the issue in tail of B., but was not in possession of the freehold. It was held by Sir *John Romilly*, M. R., that there had been no failure of the gift of the plate, and that C., and not the representatives of B., were entitled to it. "The testator," said his Honour, "in the events which have occurred, has expressed his intention, in plain words, that C. should take the estate and the plate. A disentailing deed, which the testator could not prevent, has enabled two persons now deceased, to defeat this intention, as far as regards the estate; the intention of the testator, as regards the plate, could not be defeated by them, no deed would affect it; then why is that intention not to take effect?"

Although it has been doubted whether the Court would limit a sum of money in the same way as real estate, where there was no real estate to guide the limitations (*Green* v. *Ekins*, 2 Atk. 473), the objection, if tenable, does not apply to the case of family jewels, limited by executory trust as heir-looms. See *Shelley* v. *Shelley*, 6 L. R. Eq. 540. There jewels were bequeathed to the testatrix's nephew, John Shelley, "to and be held as heir-looms by him, and by his eldest son on his decease, and to go and descend to the

eldest son of such eldest son, and so on to the eldest son of his descendants, as *far as the rules of law or equity will permit*. And *I request* my *said nephew to do all in his power, by his will or otherwise, to give effect to this my wish as to these things so directed to go as heir-looms as aforesaid*." It was held by Sir *W. Page-Wood*, V.-C., that a valid executory trust was created for John Shelley for life, with remainder to Edward Shelley, his eldest son, for life; and upon the death of Edward Shelley, in trust for Edward Shelley's eldest son, to be a vested interest in him when he should attain twenty-one; but if he should die in his, Edward Shelley's lifetime, or after Edward Shelley's death, without having attained twenty-one, leaving an eldest son born before Edward Shelley's death, in trust, for such last-mentioned eldest son to be a vested interest when he should attain twenty-one; and in case the jewels should not become vested in any persons under the limitations aforesaid, then (subject to the life interest of Edward Shelley) in trust for John Shelley absolutely.

Doctrine of cy-pres, as applicable to executory trusts.]—Where an executory trust, if carried literally into effect, would be void for illegality, as where it would infringe the rule against perpetuities, the Court, in order to carry the testator's intention into effect as far as possible, or, as it is termed, cy-pres, will direct a settlement to be made as strictly as the law will permit. Thus, in *Humberston* v. *Humberston* (1 P. Wms. 332; S. C., 2 Vern. 737: Prec. Ch. 455), where there was a devise to a corporation in trust to *convey* to A. for life, and afterwards, upon the death of A., to his first son for life, and so to the first son of that first son for life, with remainder, in default of issue male of A., to B. for life, and to his sons and their sons in the same manner; Lord *Cowper* said that though the attempt to create a perpetuity was vain, yet, so far as was consistent with the rules of law, it ought to be complied with; and he directed that all the sons already born should take estates for life, with limitations to their unborn sons in tail. See *Williams* v. *Teale*, 6 Hare, 239, and cases there cited; *Lyddon* v. *Ellison*, 19 Beav. 565, 573: *Peard* v. *Kekewich*, 15 Beav. 173; see, however, *Blagrove* v. *Hancock*, 16 Sim. 378.

As to what powers or provisions will be inserted in settlements directed to be made by the Court.]—Where in marriage articles or a will, a settlement is directed to be made with the *usual powers* or *proper* powers, a Court of equity will order to be inserted in the settlement powers of leasing for twenty-one years (*Hill* v. *Hill*,

6 Sim. 145; *Duke of Bedford* v. *Marquis of Abercorn*, 1 My. & Cr. 12); powers to grant building or mining leases where the property is fit for those purposes (*Hill* v. *Hill*, 6 Sim. 145); powers of sale and exchange (*Hill* v. *Hill*, 6 Sim. 136; *Peake* v. *Penlington*, 2 V. & B. 311; *Williams* v. *Carter*, Sug. Pow. App. 22, 7th edit. See, however, *Brewster* v. *Angell*, 1 J. & W. 625; *Horne* v. *Barton*, Jac. 439); powers of partition where there is any joint property (*Hill* v. *Hill* 6 Sim. 145); powers of appointing new trustees (*Lindow* v. *Fleetwood*, 6 Sim. 152; *Sampayo* v. *Gould*, 12 Sim. 426); but not a power to raise portions (*Higginson* v. *Barneby*, 2 S. & S. 518, and see *In re Grier's Estate*, 4 I. R. Eq. 1, 11, 12; S. C. nom. *Grier* v. *Grier*, 5 L. R. Ho. Lo. 688); nor to jointure a future wife (*Duke of Bedford* v. *Marquis of Abercorn* 1 My. & C. 312).

In considering these cases, it ought to be remembered that there is a palpable distinction between powers for the management and better enjoyment of the settled estates which are beneficial to all parties, and powers which confer personal privileges on particular parties, such as powers to jointure, or to raise money for any particular purpose. But powers of leasing, of sale, and exchange, and (where there is any joint property, or there are any mines, or any land fit for building purposes) powers of partition, of leasing mines, and of granting building leases, are powers for the general management and better enjoyment of the estates, and such powers are beneficial to all parties; *Hill* v. *Hill*, 6 Sim. 145.

But where certain powers are specifically mentioned, the expression *usual powers*, coming afterwards will be considerably narrowed (*Pearse* v. *Baron*, Jac. 158; *Hill* v. *Hill*, 6 Sim. 141; *Brewster* v. *Angell*, 1 J. & W. 625; *Horne* v. *Barton*, Jac. 439; *Higginson* v. *Barneby*, 2 S. & S. 516); unless it is contained in a separate and distinct sentence: *Lindow* v. *Fleetwood*, 6 Sim. 152.

A power of varying securities is analogous to a power of sale and exchange: so that where real estate was covenanted to be settled upon the same trusts and with the like powers, as stock settled upon trusts with power of varying securities, a power of sale and exchange of the real estate was inserted in the settlement: *Williams* v. *Carter*, 2 Sug. Pow. App., 22, 7th ed.; *Horne* v. *Barton*, Jac. 440; *Elton* v. *Elton*, 27 Beav. 634.

In the absence of express words, if in the instrument directing a settlement an intention that certain powers should be inserted in the settlement may be implied, the Court will direct the introduction of such powers. Thus, if in a will directing a settlement to be made, powers of jointuring and charging with portions are to be

given to tenants for life; and in a codicil directing a different settlement the will is in other respects referred to as the example or model to be followed; the introduction of powers of jointuring and charging, at any rate where there is full discretion given to the trustees as to the insertion of powers, provisoes, declarations, and agreements, will be authorised: *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. Ho. Lo. 543, 569, reversing S. C. nom. *Viscount Holmesdale* v. *West*, 3 L. R. Eq. 474.

But where no direction as to the insertion of powers is given, a Court of equity will not, in the absence of any expression from which the intention to include any powers may be inferred, authorise their introduction into a settlement (*Wheate* v. *Hall*, 17 Ves.; *Brewster* v. *Angell*, 1 J. & W. 628); except perhaps a power of leasing. See *Woolmore* v. *Burrows*, 1 Sim. 518; but in that case the property was in *Ireland*.

In a recent case, however, where a testator by his will directed a settlement of real and personal property to be made, but gave no direction as to powers, Sir *John Romilly*, M.R., was of opinion that the testator by simply directing a settlement, ought to be held to have intended all the *usual* powers to be included. That the settlement, therefore, ought to contain the usual powers of leasing, sale and exchange, and for the appointment of new trustees, together with a receipt clause, and provisions for maintenance, education, and advancement for the children or issue living at the death of the tenant for life, during their minority; *Turner* v. *Sargent*, 17 Beav. 515; *Byam* v. *Byam*, 19 Beav. 58; and see *Scott* v. *Steward*, 27 Beav. 367, where under a covenant to settle after-acquired property upon the same trusts as personalty was settled, or as near thereto as the nature of the property would admit, power to grant mining as well as agricultural leases was ordered by the Court to be inserted in the settlement, the prior owner having granted such leases.

Where a testator had directed, that in the event of the marriage of his daughter, a certain portion of his property should be secured to her, and the issue of her marriage, by a settlement of some or other good assurance, in such manner as his trustees or trustee for the time being might think fit, the Court on an application to which the surviving trustee was a party, approved of a power in the settlement made on the marriage of the daughter, enabling her to appoint by will a life estate in the property to her husband: *Charlton* v. *Rendall*, 11 Hare, 296.

So in *Stanley* v. *Jackman*, 23 Beav. 450, a father by will directed a fund, given to his daughter, to be settled "upon her and her issue," so that "the same might not be liable or subject to the

debts, control, or engagements of any husband" whom she might happen to marry during her lifetime. It was held by Sir *John Romilly*, M.R., that the settlement ought to give the daughter a power of appointment by will in default of issue.

Where by marriage articles personalty is settled upon the issue of the marriage, it seems that the Court would not direct the insertion of a hotch-pot clause in a settlement, in the absence of any words in the articles indicating the intention of the parties to introduce such clause: *Lees* v. *Lees*, 5 I. R. Eq. 549.

Under an executory agreement to grant a lease of an hotel, with general and usual covenants, clauses, and provisions, it was held, under the circumstances, that the lease ought to contain a power of re-entry on the lessee's becoming bankrupt, or taking the benefit of any Insolvent Act; *Haines* v. *Burnett*, 27 Beav. 500.

In a recent case, it has been held by the Lords Justices, reversing the decision of Bacon, V.-C. (reported 19 L. R. Eq. 591), that under an agreement for a lease to contain "all usual and customary mining clauses," the landlord was not entitled to have inserted in the lease a proviso for re-entry on breach of any of the covenants by the lessee, or otherwise than on non-payment of rent: *Hodgkinson* v. *Crowe*, 10 L. R. Ch. App. 622.

In carrying into effect executory trusts, the question sometimes arises whether tenants for life are or are not to be made dispunishable for waste. It seems, however, to be now settled that where, in order to give effect to the general intention, an estate of inheritance is cut down to an estate for life, the Court, in order to give the holder of such life estate the utmost power over the property consistent with his estate, makes him dispunishable for waste (*Leonard* v. *Earl of Sussex*, 2 Vern. 526; *Bankes* v. *Le Despencer*, 10 Sim. 576; 11 Sim. 508; *White* v. *Briggs*, 15 Sim. 17; 2 Ph. 583). Where, however, a settlement has been directed to be made upon persons in succession, expressly for life, with remainders over in tail, the Court will not insert a clause rendering the successive tenants for life dispunishable for waste, although the insertion of usual and proper provisions for giving effect to the intentions of the person directing the settlement be authorised: *Davenport* v. *Davenport*, 1 Hem. & M. 775. Nor will it do so where an executory trust for the settlement of freehold estates "in strict settlement" directs, either expressly or by reference to the trusts of other property, that certain persons shall take life estates: *Stanley* v. *Coulthurst*, 10 L. R. Eq. 250, where the cases are fully explained in the judgment of

Sir *R. Malins*, V.-C. And where a settlement of land has been directed to be made upon a woman on marriage, for her life with a restraint upon anticipation, it has been held that no clause should be added to the settlement, making her unimpeachable for waste, inasmuch as a life estate without impeachment of waste would be inconsistent with the restraint on anticipation: *Clive* v. *Clive*, 7 L. R. Ch. App. 433.

But even in the absence of an express direction, an intention that successive tenants for life should be made dispunishable for waste, may be implied. Thus, if in a will, directing a settlement to be made, the tenants for life are made dispunishable for waste, although, by a codicil, a different settlement is directed to be made, if the will is in other respects referred to as the model or example to be followed, its provisions will not be disregarded, and will, at any rate, where there is full discretion given to the trustees as to the insertion of powers, provisoes, declarations, and agreements, justify the limitation of life estates in the settlement directed by the codicil, with the same provisions as to waste as were given by the will: *Sackville-West* v. *Viscount Holmesdale*, 4 L. R. Ho. Lo. 543, 576.

Where, in marriage articles, there was a trust "to provide suitably" for the settlor's younger children, it was held in a case in Ireland that it was not too vague to be executed, and that the Court ought to direct an inquiry what the provision should be: *Brenan* v. *Brenan*, 2 I. R. Eq. 266.

It should be remembered that the Court of Chancery can now, under the Leases and Sales of Settled Estates Acts (19 & 20 Vict. c. 120, and 21 & 22 Vict. c. 77), authorise leases and sales of settled estates, and give general powers of leasing to trustees of settlements in cases in which formerly it would have been necessary to have made an application to parliament. And under Lord *Cranworth's* Act (23 & 24 Vict. c. 145), certain powers now commonly inserted in settlements, mortgages, and wills, are, in the absence of any directions to the contrary, given to trustees, mortgagees, and others.

Rectification of settlement.]—If a settlement directed to be made by a testator is improperly framed, it may, as in *Lord Glenorchy* v. *Bosville*, be rectified by the will; but, with regard to a settlement agreed to be made by articles, if both articles and settlement are made *before* marriage, the settlement will not in general be controlled by the articles, because, as observed by Lord *Talbot* in the principal case of *Legg* v. *Goldwire*, "when all parties are at liberty, the settlement will be taken as a new agreement."

Evidence is however admissible, to show that the articles constituted the final agreement between the parties, and that the discrepancy between the articles and settlement arose from mistake, and upon this being proved the Court will rectify the settlement, and make it conformable to the real intention of the parties: *Bold* v. *Hutchinson*, 5 De G. Mac. & G. 558, 568; but "in order to justify the Court in taking such a course, it is obvious that a *clear* intention must be proved; it must be shown that the settlement does not carry into effect the intention of the parties. If there be merely evidence of doubtful or ambiguous words having been used, the settlement itself is the construction which the parties have put upon those doubtful or ambiguous words:" per Lord *Cottenham*, C., in *The Marquis of Breadalbane* v. *The Marquis of Chandos*, 2 My. & Cr. 739.

The Court will only rectify a marriage settlement when the mistake is shown to be common to both parties (*The Earl of Bradford* v. *The Earl of Romney*, 30 Beav. 471; *Bentley* v. *Mackay*, 31 Beav. 143; *Sells* v. *Sells*, 1 Drew. & Sm. 42; *Thompson* v. *Whitmore*, 1 J. & H. 268), and it is essential that the extent of the rectification should be clearly ascertained and defined by evidence cotemporaneous with or anterior to the deed: *The Earl of Bradford* v. *The Earl of Romney*, 30 Beav. 431. And the Court will be guided by what was the intention of the parties at the time when the deed was executed, and not by what would have been their intention if, when they executed it, the result of what they did had been present to their minds: *Wilkinson* v. *Nelson*, 9 W. R. (M.R.) 393.

The Court acts with this caution in rectifying marriage settlements, and in requiring proof of the exact contract which the parties intended to enter into, because it is impossible to undo the marriage or to remit the parties to the same positions they were in before the marriage. See *Harris* v. *Pepperell*, 5 L. R. Eq. 4, and the remarks of Lord *Romilly*, M.R.

But the same rule does not apply in cases arising between lessors and lessees, or vendors and purchasers. In such cases where a deed is not actually executed, the Court will not enforce specific performance of a contract which *one* party has entered into by a mistake, and where, as in *Garrard* v. *Frankel*, 30 Beav. 445, a person supposes he has entered into a contract for a lease at one rent, and then it turns out that the rent specified is of a different amount, then, as it is in the power of the Court to put the parties in the same position as if the contract had not been executed, the Court will interfere provided the party aggrieved comes speedily for redress. See also

Bloomer v. *Spittle*, 13 L. R. Eq. 427.

Upon the same principle in *Harris* v. *Pepperell*, 5 L. R. Eq. 1, where in a conveyance of messuages, the plan on the deed comprised a piece of land not intended by the vendor to be included, Lord *Romilly*, M.R., made a decree to rectify the deed, an option being given to the purchaser to have his contract annulled. See also *Mortimer* v. *Shortland*, 2 D. & War. 363; *Harryman* v. *Collins*, 18 Beav. 11; *Sells* v. *Sells*, 1 Dr. & Sm. 42.

As to cases where the Court has rectified settlements, see *Hamil* v. *White*, 3 J. & L. 695; *Wilson* v. *Wilson*, 15 Sim. 487, 1 H. L. Ca. 538; *Walsh* v. *Trevannion*, 16 Sim. 178; *Murray* v. *Parker*, 19 Beav. 305; *In re Morse's Settlement*, 21 Beav. 174; *Torre* v. *Torre*, 1 Sm. & G. 518; *Walker* v. *Armstrong*, 21 Beav. 284, 8 De G. Mac. & G. 531; *Naylor* v. *Wright*, 5 W. R. 770, V.-C. S.; *Wolterbeck* v. *Barrow*, 23 Beav. 423; *Tomlinson* v. *Leigh*, 14 W. R. (M.R.) 121; and see *The Earl of Malmesbury* v. *The Countess of Malmesbury*, 31 Beav. 407, where a power of sale in a settlement was rectified, on proof that it was not conformable with the contract; *King* v. *King-Harmon*, 7 Ir. Eq. 496, where a settlement was reformed, by making the trusts of a term provide a portion for a daughter the only issue of the marriage, of the amount stated in the articles for one younger child. As to cases where the Court has refused to rectify settlements, see *Howkins* v. *Jackson*, 2 Mac. & G. 372; *White* v. *Anderson*, 1 Ir. Ch. Rep. 419; *Brougham* v. *Squire*, 1 Drew. 151; *Lloyd* v. *Cocker*, 19 Beav. 140; *Fyfe* v. *Arbuthnot*, 1 De G. & Jo. 406; *Elwes* v. *Elwes*, 2 Giff. 545, 9 W. R. (L. J.) 820; *Sells* v. *Sells*, 1 Drew. & Sm. 42; *Fowler* v. *Fowler*, 4 De G. & Jo. 250; *Jenner* v. *Jenner*, 6 Jur. (N. S.) 668; 8 W. R. (V.-C. S.) 537.

Where, however, the settlement, *though made before* marriage, is expressly mentioned to be made *in pursuance* or *in performance of the marriage articles*, the settlement will be rectified by them, and it will not be necessary to resort to evidence: *West* v. *Errissey*, 2 P. Wms. 349, 3 Bro. P. C. 327; *Bold* v. *Hutchinson*, 5 De G. Mac. & G. 568.

Where the settlement is made *after* marriage, it will in all cases, whether it is mentioned to be made in pursuance or performance of articles or not, be controlled and rectified by them. These distinctions as to rectifying settlements by articles (subject to the qualifications laid down by Lord *Cranworth*, C., in *Bold* v. *Hutchinson*, 5 De G. Mac. & G. 558, 568), are well stated by Lord *Talbot* in *Legg* v. *Goldwire*: see also *Honor* v. *Honor*, 2 P. Wms. 123; *Roberts* v. *Kingsley*, 1 Ves. 238; *Streatfield* v. *Streatfield*, Ca. t. Talb. 176; *Warwick* v. *Warwick*, 3 Atk. 293;

Cogan v. *Duffield*, 20 L. R. Eq. 789; 2 Ch. D. 44.

A postnuptial settlement, however, professing to be made in pursuance of articles before marriage, especially after the settlement has been acted upon for a long time, will not be reformed so as to make it accord with a mere general recital of the articles contained in the settlement, the articles themselves not being produced: *Mignon* v. *Parry*, 31 Beav. 211. And a deed not professing to be made in pursuance of articles cannot be rectified from within itself as by its own recitals: *Coates* v. *Kenna*, 7 I. R. Eq. 113, 134.

A settlement after marriage made in pursuance of articles before marriage, although in accordance with them, may be rectified upon its being proved that the articles were not in accordance with the intention of the settlor. See *Smith* v. *Iliffe*, 20 L. R. Eq. 666.

Courts of Equity will not reform a voluntary deed as against the grantor (*Phillipson* v. *Kerry*, 32 Beav. 628; *Broun* v. *Kennedy*, 33 Beav. 133; *Lister* v. *Hodgson*, 4 L. R. Eq. 30, 34, but see *Thompson* v. *Whitmore*, 1 J. & H. 268), nor will they decree a settlement as against purchasers for valuable consideration (amongst whom mortgagees are included), without notice of the articles: *West* v. *Errissey*, 2 P. Wms. 349; *Powell* v. *Price*, 2 P. Wms. 535; *Warwick* v. *Warwick*, 3 Atk. 291.

A settlement, however, will be decreed against purchasers with notice of the articles. Thus, in *Davies* v. *Davies*, 4 Beav. 54, J. D., by marriage articles, covenanted to settle an estate to the only proper use and behoof of himself, and after his decease to the use and behoof of the heirs of the said J. D. begotten or to be lawfully begotten on the body of E. D., and for want of such issue to the right heirs and assigns of the said J. D. for ever. J. D. afterwards, without having executed any settlement, mortgaged the estate by demise, and he and his wife levied a fine. The articles were handed over to the mortgagee. It was contended for the mortgagee, upon the authority of Lord *Northington*, in *Cordwell* v. *Mackrill*, 2 Eden, 344, that he was not bound to take notice of an equity arising out of the mere construction of words which were uncertain, and that the mortgagee might well suppose that the mortgagor was entitled to charge the estate. *Cusack* v. *Cusack*, (5 Bro. P.C. 116, Toml. ed.) and *White* v. *Thornborough* (2 Vern. 702) were also cited. However, Lord *Langdale*, M.R., held, that the possession of the articles gave to the mortgagee a sufficient notice of the title of the plaintiff, the eldest son of the marriage, as the articles showed a clear and distinct intention of benefiting the issue of the marriage, which could not have misled an unprofessional person, and de-

creed the estate to be conveyed to the son as tenant in tail, discharged of the mortgage with costs. *Cordwell* v. *Mackrill* may, therefore, be considered as overruled by *Davies* v. *Davies;* see also *Thompson* v. *Simpson,* 1 D. & W. 491, where Sir *Edward Sugden,* L. C. of Ireland, observes, "*Cordwell* v. *Mackrill* is a case of no great authority, though decided by a great judge... It seems to me that where, upon the whole of the articles, it is plain what construction the Court would have put upon them, had it been called to execute them about the time they were made, they should be inforced, however difficult the construction may be, even as against a purchaser with notice; but not after a lapse of time, where there is anything so equivocal or ambiguous in them as to render it doubtful how they ought to be effectuated." See also *Abbot* v. *Geraghty,* 4 Ir. Ch. Rep. 15, 24, 25.

It may here be mentioned, that in some cases of rectification, in order to get the legal estate, a reconveyance is directed by decree (*Malmesbury* v. *Malmesbury,* 31 Beav. 407, 419), but a settlement will sometimes be rectified by a decree merely, without the parties being put to the expense of a fresh deed (*Tebbitt* v. *Tebbitt,* 1 De G. & Sm. 506; *Stock* v. *Vining,* 25 Beav. 235; *White* v. *White,* 15 L. R. Eq. 247). It seems the Court will now rectify a settlement upon a petition. *In re Morse's Settlement,* 21 Beav. 174; *In re Hoare's Trusts,* 4 Giff. 254; *Lewis* v. *Hillman,* 3 Ho. Lo. 607; *In re Bird's Trusts,* 3 Ch. D. 244. And see *In re De La Touche's Settlement,* 10 L. R. Eq. 599. There, although the fact of the mistake was not admitted by all parties, the Court, upon the evidence on a Petition, filed under the Trustee Relief Act (10 & 11 Vict. c. 96), did not order the Petition to be rectified, but prefacing the order with a declaration, that it appeared the words in question were inserted by mistake, made an order for distribution of the fund as if the clause had not been inserted. See however *In re Malet,* 30 Beav. 407.

KEECH *v.* SANDFORD.

October 31*st*, 1726.

[REPORTED SELECT CASES IN CHANCERY, 61.]

RENEWAL OF A LEASE BY A TRUSTEE.]—*A. being possessed of a Lease of a Market bequeathed it to B. in trust for an infant. B., before the expiration of the term, applied to the Lessor for a renewal for the benefit of the Infant. The Lessor refused to grant such renewal, whereupon B. got a Lease made to himself. Held that B. was Trustee of the Lease for the Infant, and must assign the same to him and account for the profits, but that he was entitled to be indemnified from the Covenants contained in the Lease.*

A PERSON being possessed of a lease of the profits of a market, devised his estate to a trustee in trust for the infant. *Before* the expiration of the term the trustee applied to the lessor for a renewal, for the benefit of the infant, which he refused, in regard that, it being only of the profits of a market, there could be no distress, and must rest singly in covenant, which the infant could not enter into.

There was clear proof of the refusal to renew for the benefit of the infant, on which the trustee gets a lease made to himself.

Bill is now brought [by the infant] to have the lease assigned to him, and for an account of the profits, on this principle, that wherever a lease is renewed by a trustee or executor, it shall be for the benefit of cestui que use, which principle was agreed on the other side, though endeavoured to be differenced on account of the express proof of refusal to renew to the infant.

LORD CHANCELLOR KING.—I must consider this as a trust for the infant, for I very well see, if a trustee, on

the refusal to renew, might have a lease to himself, few trust estates would be renewed to cestui que use. Though I do not say there is a fraud in this case, yet he [the trustee] should rather have let it run out than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequences of letting trustees have the lease on refusal to renew to cestui que use.

So decreed, that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal.

Keech v. *Sandford*, sometimes called the *Rumford Market Case*, is usually cited as the leading authority on the doctrine of constructive trusts arising upon the renewal of a lease by a trustee or executor in his own name and for his own benefit. The rule here inflexibly laid down by Lord *King* has ever since been invariably followed; viz. that a lease renewed by a trustee or executor, in his own name, even in the absence of fraud and upon the refusal of the lessor to grant a new lease to the cestui que trust, shall be held upon trust for the person entitled to the old lease: see *Fitzgibbon* v. *Scanlan*, 1 Dow, 261, 269; *Rawe* v. *Chichester*, Amb. 715; *S. C.*, 1 Bro. C. C. 198 n.; 2 Dick. 480; *Pickering* v. *Vowles*, 1 Bro. C. C. 198; *Pierson* v. *Shore*, 1 Atk. 480; *Nesbitt* v. *Tredennick*, 1 Ball & B. 46; *Abney* v. *Miller*, 2 Atk. 597; *Edwards* v. *Lewis*, 3 Atk. 538; *Killick* v. *Flexney*, 4 Bro. P. C. 161; *Moody* v. *Matthews*, 7 Ves. 174; *James* v. *Dean*, 11 Ves. 383; *Parker* v. *Brooke*, 9 Ves. 583; *Lovatt* v. *Knipe*, 12 Ir. Eq. Rep. 124; *Kendall* v. *Marsters*, 2 De G. F. & Jo. 200; see also *Walley* v. *Walley*, 1 Vern. 484; and *Holt* v. *Holt*, 1 Ch. Ca. 190, which seems to be the oldest case upon the subject.

And in a recent case in Ireland the rule was held to apply to an *administratrix* of a deceased tenant from year to year, who upon obtaining a new tenancy from year to year, was held a trustee thereof for the next of kin of the intestate: *Kelly* v. *Kelly*, 8 I. R. Eq. 403. There the widow and administratrix of a tenant from year to year, of a holding in Ulster,

continued in possession for two years after his death, and the tenancy having been then determined by notice to quit, offered no resistance to an ejectment brought by the landlord, who took formal possession, but left her in undisturbed possession at the same rent. It was held by Chatterton, V.-C., that though there was no fraud in the transaction, the new tenancy was a graft on the old one for the benefit of the next of kin of the intestate, even though there was a custom on the estate that a holding should not be divided amongst the next of kin of an intestate, but be given to the widow if a desirable tenant.

The same rule applies also to an executor de son tort renewing in his own name: *Mulvany* v. *Dillon*, 1 J. & B. 409; *Griffin* v. *Griffin*, 2 S. & L. 352. But where a trustee obtains a new lease, which comprises, not only the premises in the original lease, but also additional lands, the trusts will not attach upon the additional lands: *Acheson* v. *Fair*, 3 D. & W. 512; 2 C. & L. 208.

In *Foord* v. *Baker*, 27 Beav. 193, a scheme made in 1855 provided, that no person should act as trustee of the charity, who should hold or occupy any part of the charity property. At that time one of the trustees held a small piece of charity land under a twenty-one years' lease granted in 1847 by public tender. It was held by Sir *John Romilly*, M.R., that he must either give up the lease or the trusteeship.

The ground of decreeing renewals by trustees and executors to enure to the benefit of cestui que trusts is public policy to prevent persons in such situations from acting so as to take a benefit to themselves: *Griffin* v. *Griffin*, 1 S. & L. 354, per Lord *Redesdale*; and see *Blewett* v. *Millett*, 7 Bro. P. C. 367, Toml. ed.

So, if a person having a limited interest in a renewable lease, as a tenant for life, renews it in his own name, he will be held a trustee for those entitled in remainder to the old lease: (*Rawe* v. *Chichester*, Amb. 715; *S. C.*, 5 Dick. 480; 1 Bro. C. C. 198, n.; *Taster* v. *Marriott*, Amb. 668; *Owen* v. *Williams*, Amb. 734; *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291; *Bowles* v. *Stewart*, 1 S. & L. 209; *Randall* v. *Russell*, 3 Mer. 190; *Giddings* v. *Giddings*, 3 Russ. 241; *Nesbitt* v. *Tredennick*, 1 Ball & B. 46; *Eyre* v. *Dolphin*, 2 Ball & B. 290; *Tanner* v. *Elworthy*, 4 Beav. 487; *Waters* v. *Bailey*, 2 You. & Coll. C. C. 224; *Buckley* v. *Lanauze*, L. & G., t. Plunk. 327; *Hill* v. *Mill*, 12 Ir. Eq. Rep. 107; *Mill* v. *Hill*, 3 H. L. Cas. 828; *Trumper* v. *Trumper*, 14 L. R. Eq. 295; 8 L. R. Ch. App. 870); and in the case of a tenant for life under a will, even although the original lease may have expired during the life of the testator, who had continued to hold merely as tenant from year to year. See

James v. *Dean*, 11 Ves. 383; *S. C.*, 15 Ves. 236, where a testator bequeathed leaseholds for years determinable upon lives to his widow (who was his residuary legatee and executrix) for life, with remainder over; the term expired during the testator's life, who continued to hold as tenant from year to year: a subsequent lease, obtained by his widow, was held to be subject to the trusts of the will, as the residue of the term at his death, if any, however short, would have been. "The question," said Lord *Eldon* (see 11 Ves. 395), "is, as the interest which passed at the testator's death was an interest he could bequeath by a will antecedent to his acquiring it, and that interest, though but a tenancy from year to year being bequeathed to one for life, with remainder to another, if, during the tenancy of the person who took for life, acting upon the goodwill that accompanies the possession, she gets a more durable term, whether the persons who are to take against her, are or are not entitled to say, that term is acquired for their benefit as well as her own. If she had died in his lifetime, his term from year to year would have passed to the remainderman, who would have been specifically entitled to it. The consequence is, the term, though short, is bequeathed in these particular estates; and it cannot depend upon the question, whether the interest is long or short. Suppose only a quarter of a year subsisted at the death of the testator, if the tenant for life did renew, it must have been as well for the benefit of the persons to take afterwards as herself." If, however, the testator in *James* v. *Dean* had only been tenant at will or at sufferance, the widow upon renewal of the lease would not have been a trustee for the persons to whom the leaseholds were bequeathed in remainder, for as a tenancy at will or at sufferance would have determined upon the death of the testator, no interest would have passed to them by the will; but Lord *Eldon* was inclined to think, that, had the widow not been residuary legatee, she would, in such a case, have been a trustee for the residuary legatee. "The question," observed his lordship (see 11 Ves. 393), "is new, whether an executrix, dealing with the opportunities which she derives by her succession without title to the estate a tenant by sufferance or at will had held, is a trustee for the person, who cannot say he took an interest under the will, or whether it is to be said against her only, that the advantage she made of those opportunities should be for the general estate. The result is this: I think it is impossible she could hold it for herself. Not applying it to this case, but supposing another person, not the wife, was residuary legatee, the question, I should think, would be in favour of that other residuary legatee,

being a casual advantage from the dealing of the executrix." See also *Randall* v. *Russell*, 3 Mer. 190; *Mill* v. *Hill*, 3 H. L. Cas. 866; *Archbold* v. *Scully*, 9 Ho. Lo. Cas. 360. *In re Tottenham's Estate*, 16 Ir. Ch. Rep. 115.

Although a tenant for life of a lease under a settlement be himself the author of it, if he renew the lease in his own name, he will be a trustee for the parties interested under the settlement: *Pickering* v. *Voules*, 1 Bro. C. C. 197; *Colegrave* v. *Manby*, 6 Madd. 72; *S. C.*, 2 Russ. 238. And the fact of the settlement containing a special provision that a particular renewal shall enure for the benefit of the trust, will not prevent the application of the general rule: *Tanner* v. *Elworthy*, 4 Beav. 487.

By analogy to these cases, if not under the 73rd section of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), when a tenant for life receives a sum of money for withdrawing opposition to a bill, and the act then passes authorising the taking of the land in settlement, whether the land is taken or not, and whether the act is proceeded upon or not, the money so received must be held for the benefit of all the parties interested: *Pole* v. *Pole*, 2 D. & Sm. 420; *Re Duke of Marlborough's Estates*, 13 Jur. 738; *Earl of Shrewsbury* v. *North Staffordshire Railway Company*, 1 L. R. Eq. 593, 608, *sed vide Ex parte Lockwood*, 14 Beav. 158; *Ex parte The Rector of Little Stecping*, 5 Railway Ca. 207.

So where a tenant for life of renewable leaseholds has a general power of appointment, which he does exercise, a renewal in his own name, not being an execution of the power, will enure over at his death for the benefit of the remainderman. In *Brookman* v. *Hales*, 2 V. & B. 45.

And where a person who is trustee of property for himself and others, acquires, under an Act of Parliament, upon the representation that he was solely entitled, an absolute interest therein, he will, nevertheless, be held a trustee for all the parties beneficially interested, of whatever estate or right he may have so acquired. Thus: in *Cooper* v. *Phibbs*, 2 L. R. Ho. Lo. 149, E. J. Cooper, being in possession of certain estates and a fishery, which, by a settlement in 1827, he had covenanted to settle, after previous limitations to himself and his issue male, on his brother, R. W. Cooper, for life, with remainder to his issue male, obtained an Act of Parliament, which, after reciting (among other things) that the estates and fishery had descended to and were then vested in the said E. J. Cooper, and that the said E. J. Cooper was desirous of constructing canals or water cuts, at his own expense, in consideration of the exclusive right of fishery being vested in him,

his heirs and assigns, it was therefore enacted that the said powers to make the canals and cuts should be granted to him, provided that the cuts "shall be altogether situated on the estates and property of the said E. J. Cooper." There were various other provisions, in all of which E. J. Cooper was spoken of as the owner of the estate. E. J. Cooper having died without issue male, it was held by the House of Lords that E. J. Cooper, under the Act of Parliament, took the fishery bound by the trusts of the settlement of 1827. "I must," said Lord Westbury, "of necessity assume that E. J. Cooper had the intention of stating the truth and the fact to the legislature. When, therefore, I find in this Act of Parliament a recital that this fishery, together with the other hereditaments, on the death of the lunatic, descended to E. J. Cooper, in fee, that must be taken to represent to Parliament that the trust estate did so descend. Your lordships are bound to assume E. J. Cooper's honesty and integrity of purpose, and therefore you cannot for a moment impute to him that he intended to conceal from the legislature the fact of the property being bound by the trusts of the settlement. You must take the recital contained in the Act of Parliament as a recital intended to denote the descent of the legal estate in fee held by him upon trust, and you cannot impute to him an intention of representing to Parliament that it was his own property, because you cannot for a moment suppose that he was ignorant of the agreement or contract contained in that deed, or that he intended to repudiate the obligation which he had contracted under that deed. Then, if it be taken that he stood before Parliament as a trustee, the powers and authorities conferred upon him by that Act of Parliament are conferred upon him in his character of trustee. They are attached to the ownership in fee, which he represents himself to have had; and as that ownership was subject to the trust, the powers and authorities attached to the ownership are in like manner subject to the obligation of that trust, and the things acquired by virtue of those powers and authorities would also be subject to the trusts which affected the individual who becomes the parliamentary donee of those powers. There can be no doubt for a moment, therefore, with regard to the settled principles of equity, that what was given to him in the character of owner in trust for the other persons, and what was acquired by him in virtue of those powers, became also subject to that trust. The result, therefore, is, that all he acquired by virtue of the parliamentary powers would become subject to the trusts of the settlement of 1827, subject only to the repayment to him by

the parties entitled under those trusts of the moneys properly expended by him in acquiring additional rights of fishery, and improving the whole."

Upon the same principle where the tenant for life, under a devise, of an encroachment upon the property of the Crown in the Forest of Dean, took under an Act of Parliament (1 & 2 Vict. c. 42) for confirming the titles to the encroachments, a conveyance to herself in fee, it was held that as the act was intended only to provide for disputes between parties claiming adversely the legal right (speaking without regard to the Crown's title) to be in possession and treated as holders, the devisee had acquired the fee, not only for her own benefit, but also for the benefit of those in remainder: *Yem* v. *Edwards*, 3 K. & J. 564, 1 De G. & Jo. 598. On the subject of encroachments by tenants, see *Andrews* v. *Hailes*, 2 Ell. & B. 349; *Kingsmill* v. *Millard*, 11 Exch. 313.

If one of several persons jointly interested in a lease renew it in his own name, he will hold in trust for the others, according to their respective shares. Thus, in *Palmer* v. *Young*, 1 Vern. 276, one of three who held a lease under a dean and chapter, surrendered the old lease, and took a new one to himself: the Court said it should be a trust for all. See also *Hamilton* v. *Denny*, 1 Ball & B. 199; *Jackson* v. *Welsh*, L. & G., t. Plunk. 346.

Where a tenant for life, and remainderman of a lease for lives, take a renewal thereof to themselves as joint tenants, in the absence of anything shewing a contrary intention, their prior interests in equity will remain unaltered. See *Hill* v. *Hill*, 8 I. R. Eq. 140; there lands held under a lease for lives, having been devised to Mary Hill for life, and after her death to Thomas Hill absolutely, they joined in surrendering the lease, and procured a new one for lives to themselves and their heirs. There was nothing in the new lease, beyond the grant of it in the ordinary form of joint tenancy, which expressed anything as to the intention of the parties in obtaining it. The consideration for the new lease was contributed unequally by the lessees. Thomas Hill devised the lands, but Mary Hill survived him and devised them to the defendants. It was held by Chatterton, V.-C., that the legal estate granted by the new lease was vested in the defendants as devisees of Mary Hill, in trust for the plaintiff, as the heir-at-law of Thomas Hill, and also of his devisee. "I think," said his Honour, "that in cases like the present the Court will consider, in the absence of any proof of a contrary intention beyond the mere form of the habendum of the grant, that the parties surrendered their existing interests merely for the purpose of renewal,

and not with the object of altering those interests; and that the new legal estate must accordingly be held in trust for the parties respectively, according to their interests in the previously existing estate." This case was, on appeal, affirmed, with a slight variation. See *Hill* v. *Hill*, 8 I. R. Eq. 622.

And if a person jointly interested with an infant, renew, and the renewed lease turn out not to be beneficial, the person renewing must sustain the loss; if beneficial, the infant can claim his share of the benefit to be derived from it. This is the peculiar privilege of the unprotected situation of the infant. But to any sums which may have been paid for the renewal of the lease, or in consequence of it, the infant must contribute his due proportion, before he can claim any advantage: *Ex parte Grace*, 1 B. & P. 376.

So, likewise, if a partner renew a lease of the partnership premises on his own account, he will, as a general rule, be held a trustee of it for the firm. "It is clear," observed an eminent judge, "that one partner cannot treat privately, and behind the backs of his copartners, for a lease of the premises where the joint trade is carried on, for his own individual benefit: if he does so treat, and obtains a lease in his own name, it is a trust for the partnership. In this respect there can be no distinction, whether the partnership is for a definite or indefinite period. If one partner might so act in the latter case, he might equally in the former. Supposing the lease and the partnership to have different terms of duration, he might, having clandestinely obtained a renewal of the lease, say to the other partners, 'The premises on which we carried on our trade have become mine exclusively; and I am entitled to demand from you whatever terms I think fit, as the condition for permitting you to carry on that trade here:'" per Sir *William Grant*, M. R., in *Featherstonhaugh* v. *Fenwick*, 17 Ves. 311. See also *Alder* v. *Fouracre*, 3 Swanst. 489; *Fawcett* v. *Whitehouse*, 1 Russ. & My. 132; *Clegg* v. *Edmondson*, 22 Beav. 125; 8 De G. Mac. & G. 787; *Clements* v. *Hall*, 2 De G. & Jo. 173; reversing *S. C.*, 24 Beav. 333; *Gordon* v. *Scott*, 12 Moo. P. C. C. 1. In *Clegg* v. *Fishwick*, 1 Mac. & G. 294, the plaintiff's husband being engaged in partnership with other persons, they took a lease in 1828 of certain coal mines, for the purpose of the partnership. He died in 1836, and the plaintiff took out letters of administration. There was no provision made for the continuance of the partnership with the administratrix; but it was in fact carried on between her and the other partners up to the year 1849, the same partnership property being used for the purposes of the partnership. In

that year the old lease having expired a new lease was taken by some of the other partners, without the privity of the plaintiffs. It was held by Lord *Cottenham*, C., that the administratrix was entitled to a Receiver in respect of the intestate's share of the partnership including the renewed lease.

The rule, however, to be deduced from the last-mentioned class of cases has been to some extent departed from where the trade or business carried on in connection with a lease, is one of a speculative character, requiring great outlay with uncertain returns. Thus, if in such a business, for instance, a mining concern, the surviving partner renews the lease in his own sole name and carries on the business with his own capital and in his own name, the Court will not in general assist the representative of the deceased partner unless he comes forward promptly, and is ready to contribute a due proportion of money for the purpose of the business, for it would be unjust to permit the executor of the deceased partner to lie by and remain passive while the survivor is incurring all the risk of loss, and only to claim to participate after the affairs have turned out to be prosperous (per Lord *Cranworth*, C., 2 De G. & Jo. 186); but this exception to the rule does not apply where the surviving partner who renews the lease keeps the representative of the deceased partner in ignorance of the real state of the concern, for he is bound to disclose *uberrimâ fide* every fact which may enable the representative to exercise a sound discretion as to the course he ought to pursue: *Clements* v. *Hall*, 2 De G. & Jo. 173, 188.

If a mortgagee renew a lease, the renewal shall be for the benefit of the mortgagor, paying the mortgagee his charges; and per Lord Chancellor *Nottingham*, "The mortgagee here doth but graft upon his stock, and it shall be for the mortgagor's benefit:" *Rushworth's Case*, Freem. 12; *Luckin* v. *Rushworth*, Rep. t. Finch, 392; *S.C.*, 2 Ch. Rep. 113; *Darrell* v. *Whitchot*, 2 Ch. Rep. 59; nor will the case be altered by the expiration of the lease before renewal: *Rakestraw* v. *Brewer*, 2 P. Wms. 510. See *Nesbitt* v. *Tredennick*, 1 Ball & B. 29. On the other hand, if a lessee mortgage leaseholds, and afterwards obtain a new lease, the new lease will be held a graft on the old one, for the benefit of the mortgagee: *Smith* v. *Chichester*, 1 C. & L. 486.

Upon the same principle, if a person entitled to a lease, subject to debts, legacies, or annuities, renews, either in his own name or in the name of a trustee, the incumbrances will remain a charge upon the renewed lease: *Seabourne* v. *Powel*, 2 Vern. 11; *Jackson* v. *Welsh*, L. & G., t. Plunk. 346; *Winslow* v. *Tighe*, 2 Ball & B.

195; *Stubbs* v. *Roth*, 2 Ball & B. 548; *Webb* v. *Lugar*, 2 You. & Coll. Exch. Ca. 247; *Jones* v. *Kearney*, 1 C. & L. 34; *Otter* v. *Vaux*, 6 De G. Mac. & G. 638.

And a lessee will not be allowed to evade the operation of the rule laid down in the principal case by fraudulently incurring a forfeiture of the lease which he induces the landlord to take advantage of, and afterwards obtains from him a new lease: *Hughes* v. *Howard*, 25 Beav. 575; *Stratton* v. *Murphy*, 1 I. R. Eq. 345.

If a person, having the right of renewal, sells such right, the money produced by the sale will be affected by the same trusts as the leaseholds, if renewed, would have been. Thus, in *Owen* v. *Williams*, Amb. 734, where a tenant for life of a Crown lease applied for a further term, but a powerful opponent having applied for a grant, the tenant for life gave up her pretensions for a sum of money, Lord *Apsley*, upon the authority of the principal case, held that the money ought to be settled upon the same trusts as the lease. And in *Lombard* v. *Hickson*, 13 Ir. Ch. Rep. 98, an execution creditor of the lessee of a share, of renewable leaseholds, of which he had obtained possession by ejectment, and who bought the superior lease, was held bound by a jointure rent created by the lessee, and of which he had notice.

A person acting as agent, or in any similar capacity, for a person having an interest in a lease, cannot renew for his own benefit. See *Edwards* v. *Lewis*, 3 Atk. 538; *Griffin* v. *Griffin*, 1 S. & L. 352; *Mulvany* v. *Dillon*, 1 Ball & B. 417; and *Mulhallen* v. *Marum*, 3 D. & W. 317, in which case a lease was obtained by a person standing, by delegation, in the place of guardians, and who, at the same time, filled the characters of agent, receiver, and tenant; it was set aside by Sir *Edward Sugden*, L. C., upon the equity arising out of those relations and upon public policy.

A trustee who has renewed will be directed to assign the lease, free from incumbrances, except it seems, any lease made by him bonâ fide at the best rent; (*Bowles* v. *Stewart*, 1 S. & L. 230); and he must account also for the mesne rents and profits and fines which he may have received; (*Mulvany* v. *Dillon*, 1 Ball & B. 409; *Walley* v. *Walley*, 1 Vern. 484; *Luckin* v. *Rushworth*, Finch, 392; *Blewett* v. *Millett*, 7 Bro. P. C. 367, Toml. ed.; *Rawe* v. *Chichester*, Amb. 715); even although the lease had expired before the bill was filed: *Eyre* v. *Dolphin*, 2 Ball & B. 290. But where a tenant for life has renewed, the account will commence only from his decease: *Giddings* v. *Giddings*, 3 Russ. 241. On the other hand, the person who has renewed the lease will be entitled, as in the principal case, to be indemnified

against the covenants he may have entered into with the lessor; (*Giddings* v. *Giddings*, 3 Russ. 241); and he will also have a lien upon the estate for the costs and expenses of renewing the lease, with interest; (*Rawe* v. *Chichester*, Amb. 715, 720; *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291; *Lawrence* v. *Maggs*, 1 Eden, 453, and note; *James* v. *Dean*, 11 Ves. 383; *Kempton* v. *Packman*, cited 7 Ves. 176); and for the expenses of lasting improvements; (*Holt* v. *Holt*, 1 Ch. Ca. 190; and see *Lawrence* v. *Maggs*, and note; *Mill* v. *Hill*, 3 H. L. Cas. 828, 869); even though incurred after the institution of the suit; (*Walley* v. *Walley*, 1 Vern. 487); but not for any improvements adopted as a mere matter of taste, or as a matter of personal convenience; (*Mill* v. *Hill*, 3 H. L. Cas. 869); at the same time there may be many charges in the nature of waste, and as to deterioration, which must be set off against anything found due in respect of improvements. (*Ib.*) So also will a tenant for life have a lien for such proportion of the fine upon renewal as ought to be borne by the remainderman: *Lawrence* v. *Maggs*, and note by Eden.

Upon the same principle a tenant for life of shares comprised in a settlement has a lien on the shares for repayment with interest of advances made at the request of the trustees for the purpose of paying calls on the shares, even though the trustees might, by exercising powers vested in them, have raised the necessary funds for that purpose: *Todd* v. *Moorhouse*, 19 L. R. Eq. 69.

As to contribution towards payment of fines upon renewals, see *White* v. *White*, 9 Ves. 554; *Playters* v. *Abbott*, 2 My. & K. 97; *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 My. & K. 111; *Reeves* v. *Creswick*, 3 You. & Coll. Exch. Ca. 715; *Jones* v. *Jones*, 5 Hare, 440; *Giddings* v. *Giddings*, 3 Russ. 241, 259. Tudor's Lead. Cas. Real Prop. 76—82, 2nd ed.

The same remedies which, as we have before seen, may be had against trustees, executors, and persons with limited interests, renewing leases in their own names, may also be had against volunteers claiming through them (*Bowles* v. *Stewart*, 1 S. & L. 209; *Eyre* v. *Dolphin*, 2 Ball & B. 290; *Blewet* v. *Millett*, 7 Bro. P. C. Toml. ed., 367); and against purchasers from them, with notice express or implied: *Walley* v. *Walley*, 1 Vern. 484; *Eyre* v. *Dolphin*, 2 Ball & B. 290; *Parker* v. *Brooke*, 9 Ves. 583; *Stratton* v. *Murphy*, 1 I. R. Eq. 345. In *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291, a recital, in a lease assigned to a mortgagee, of the surrender of a former lease, in which mention was made of the settlement under which the cestui que trust claimed, was held to be constructive notice.

And where a deed by which the lease is settled is registered under the Irish Registry Act (6 Ann. c. 2), a purchaser, although without notice from a person having a limited interest, who has renewed the lease in his own name, will be held to be a trustee for the parties interested under the settlement: *Hill* v. *Mill*, 12 Ir. Eq. Rep. 107; *S. C.*, nom. *Mill* v. *Hill*, 3 H. L. Cas. 828.

But the cestui que trust may be bound by acquiescence and lapse of time. (See *Isald* v. *Fitzgerald*, cited in *Owen* v. *Williams*, Amb. 735, 737; *Norris* v. *Le Neve*, 3 Atk. 38, 39; *Jackson* v. *Welsh*, L. & G., Ca. temp. Plunk. 346.) Especially where the property sought to be affected with a trust, is, as in the case of mines, subject to extraordinary contingencies, and is capable of being rendered productive only by a large and uncertain outlay: *Clegg* v. *Edmondson*, 8 De G. Mac. & G. 787.

A tenant for life, under a settlement of leaseholds, procuring a renewal to himself, does not take the renewal as an express trustee upon the trusts of the settlement, the Statute of Limitations (3 & 4 Will. 4, c. 27) therefore will run as against other persons claiming under the settlement, *In re Dane's Estate*, 5 I. R. Eq. 498.

When it is impossible to obtain the renewal of a lease, if there be no predominant trust for renewal, overriding the disposition in favour of the subsequent tenant for life, the latter, it seems, will be entitled to the sum accumulated by the direction of the settlor for that purpose. See *Morres* v. *Hodges*, 27 Beav. 625; there, by a settlement, the trustees were to use their utmost endeavours to renew an ecclesiastical lease upon reasonable terms, and to raise the fines out of the rents or by mortgage. A renewal became impracticable. It was held by Sir *John Romilly*, with evident reluctance, upon the authority of *Tardiff* v. *Robinson*, 27 Beav. 629 n.—a decision of Lord *Eldon's*, —that the fund reserved by the trustees out of the rents for the purpose of renewal belonged absolutely to the tenant for life; and see *Richardson* v. *Moore*, 6 Madd. 83 n. cited; *In re Money's Trusts*, 2 D. & Sm. 94.

Nor would the Court in such a case, where the trustees have a mere power to renew, allow them to purchase the reversion in leaseholds under the Episcopal and Capitular Estates Act (23 & 24 Vict. c. 124) to the prejudice of the tenant for life. See *Hayward* v. *Pile*, 5 L. R. Ch. App. 214. There a testatrix bequeathed leaseholds under a Dean and Chapter to trustees on trust for a tenant for life, with remainders over, and with power to raise money for renewing the leases. The property became vested in the Ecclesiastical Commissioners,

with whom the trustees under 23 & 24 Vict. c. 124, agreed for the purchase of the reversion in part of the leaseholds, in consideration of the surrender of the other part, and the payment of a sum of money. The estate of the testatrix was administered by the Court, and the agreement was made subject to the approval of the Court. It was held by Lord *Hatherley*, L. C., affirming the decision of Lord *Romilly*, M. R., that the Court would not approve of the agreement against the wish of the tenant for life, if his income would be considerably reduced by the purchase. See *Jones* v. *Jones*, 5 Hare, 440, 460, 462.

Where, however, it appears to have been the paramount intention of the testator, as indicated by the disposition made by his will, that those entitled in reversion expectant upon the decease of a tenant for life should succeed to the enjoyment of substantially the same estate, the tenant for life, upon the renewal becoming impracticable, will only be entitled to the income arising from the sum set apart for renewal, and of the sum produced by the sale of the leaseholds. See *Maddy* v. *Hall*, 3 Ch. D. 327. There a testator gave to trustees a tithe rent-charge held under an ecclesiastical lease for twenty-one years, which was in practice renewed every seven years on payment of a fine, upon trust to renew out of the proceeds, and to apply the surplus in a certain way during the life of his wife, and directed that after her death it should form part of his residuary estate. He gave his trustees power at any time to sell the leasehold interest. The lease having ceased to be renewable, it was held by the Court of Appeal, reversing the decision of *Malins*, V.-C., that the leasehold interest ought to be sold, and the proceeds invested, and only the income of this fund and the renewal fund applied as income.

And where a similar intention is shown with regard to renewable leaseholds which are afterwards taken by a railway company under its compulsory powers, a tenant for life will only be entitled to the interest arising from the purchase-money, although the custom to renew may not have ceased until after the premises were taken by the railway company. Thus, in *Re Wood's Estate*, 10 L. R. Eq. 572, leaseholds under a Dean and Chapter, renewable by custom, were held by trustees upon trust for a tenant for life, with remainder over; and the trustees were directed, "two years, or sooner, before the time for renewal," to bring a part of the rental into a fund until a sufficient sum was raised for the renewal, "so that the estates may be always kept renewed . . for ever." In June, 1865, and February, 1866, notices to treat for parts of the leaseholds, then

having about thirteen, and five, years respectively to run, were given by a Railway Company. At Lady-day, 1866, the Dean and Chapter ceased to renew leases; and about the same date their property was taken over by the Ecclesiastical Commissioners.—The values of the two properties having been assessed at amounts which, when paid, and invested in £3 per cent. stock, gave a diminished income, it was argued that as the renewal had become impossible, all trust for renewal had ceased, and that the property ought to be dealt with as if it were a mere leasehold for a term of years, to which the tenant for life was entitled *in specie;* and that, therefore, the tenant for life was entitled to have the whole fund treated as converted into an annuity of duration equivalent to the term, and to have each year one year's payment of the annuity. It was, however, held by Sir *W. M. James*, L. J., that the tenant for life was only entitled to the dividends of the fund arising from the sale of the leaseholds to the Railway Company. "I am of opinion," said his lordship, "that I am not in the present case bound by those cases of *Morres* v. *Hodges* (27 Beav. 625), and *Tardiff* v. *Robinson* (27 Beav. 629, n.). In those cases the conclusion arrived at by the Court was, that the tenant for life was entitled *in specie* to the whole rents and profits, charged only with the payment of such a sum as might be required for the renewal, and as no renewal was practicable, there was nothing by which the charge could be maintained, and no means by which any substituted benefit could be ascertained by the Court to be given to the remainderman. In this case, however, the primary and paramount intention was 'that the estates may be always kept renewed, and that the younger children may have an equal benefit of time, and so continue to be provided for, for ever.' . . . The testator intended to create, and was creating as he thought, a perpetual estate, out of which he was carving successive interests. . . . The result, in my opinion, of the purchase by the Railway Company is, that one property in perpetuity is substituted for another property in perpetuity; and that as between the tenant for life and the remainderman, I cannot take away any part of the corpus belonging to the latter, in order to make good the diminished income of the former."

Where a trust for renewal of leaseholds is absolute and overrules the interest of the tenant for life, he is not entitled to object, on the ground of the reduction of his interest, to any arrangement in lieu of renewal, which may be made under the provisions of the Episcopal and Capitular Estates Act (23 & 24 Vict. c. 124), where renewal ceases to be

possible, so long as the best practicable terms are obtained. See *Hollier* v. *Burne*, 16 L. R. Eq. 163. There a testator bequeathed specifically leaseholds held under a Dean and Chapter to trustees upon trust for a tenant for life, with remainders over. The will contained directions amounting to a trust for renewal overriding the interest of the tenant for life, and also an absolute power of sale in the trustees. The reversion became vested in the Ecclesiastical Commissioners, who refused to renew, but were willing to sell the reversion in part of the property in consideration of the surrender of the lease of the rest and payment of a sum of money. The tenant for life opposed the acceptance of such proposal, on the ground that her income would be greatly diminished. It was held by Lord *Selbourne*, C., sitting for the Master of the Rolls, that the proposed arrangement was within the powers conferred by the will and the statute 23 & 24 Vict. c. 124, and that the Court had power to direct it to be carried into effect; and an inquiry was directed whether the proposed arrangement was proper and beneficial, having regard to the value of the leasehold property and the right of the remainderman under the will to succeed, upon the death of the tenant for life, to the enjoyment as nearly as might be of the corpus of the same property to the income of which the tenant for life was entitled during his life.

It is undetermined whether the purchase of the reversion from the lessor by trustees or a tenant for life of a lease comes within the rule which precludes them from renewing such lease for their own benefit, although such a purchase may be made from a stranger. In *Randall* v. *Russell*, 3 Mer. 190, where a tenant for life of leaseholds held of a college, purchased the reversion in fee from a stranger, to whom the college had sold it; upon a bill filed by the remaindermen, contending that the situation of the tenant for life gave her an opportunity to make the purchase, and that she ought to be turned into a trustee of the reversion for them, Sir *William Grant*, M.R., said that no case was mentioned in which this sort of equity had been carried to such a length. The college had aliened the property to an individual. The benefit attending the tenant right of renewal with a public body was gone, and a lease at rack-rent was all that was to be expected from the private proprietor. His Honour, therefore, held, that the reversion was not subject to the trusts of the will. With respect to the question, whether the tenant or life could have become a purchaser of the reversion, not from a mere stranger, but from the college, his Honour observed, that it might be said that she thereby

intercepted and cut off the chance of future renewals, and consequently made use of her situation to prejudice the interests of those who stood behind her; and that there might be some sort of equity in their claim to have the reversion considered as a substitution for those interests, although he was not aware of any decision to that effect. See *Hardman* v. *Johnson*, 3 Mer. 347; *Norris* v. *Le Neve*, 3 Atk. 37: *Lesley's Case*, Freem. 52.

Where, however, the executor of a mortgagee purchased the equity of redemption of the mortgaged estate in his own name, with the money due on the mortgage and a small advance beyond it, he was held to be a trustee of the purchased property for the benefit of the testator's estate: *Fosbrooke* v. *Balguy*, 1 My. & K. 226.

A quasi tenant in tail of leaseholds, being the absolute owner of them, is not bound by the same equities as persons having merely limited interests; thus, where a testator devised leaseholds for lives to trustees for A., and the heirs of his body, and if he should die without issue, remainder to B., A. surrendered the old lease, and took a new one to himself and his heirs for three new lives, and died without issue, having devised the leaseholds to his widow for life, remainders over. A bill, filed by B., to have the benefit of the new lease, insisting that the surrender of the old lease and taking the new one, was not sufficient to bar the limitation to him, and that those claiming under A. ought to be held trustees of the new lease, was dismissed: *Blake* v. *Blake*, 1 Cox, 266.

Where a stranger obtains a renewal of a lease, or a reversionary lease, the old tenant has no equity against him: *Lee* v. *Lord Vernon*, 5 Bro. P. C. 10, Toml. ed.; *Earl of Sandwich* v. *Earl of Lichfield*, Colles, P. C. 104; *Stokes* v. *Clarke*, Colles, P. C. 192; *Nesbitt* v. *Tredennick*, 1 Ball & B. 29; *Lesley's Case*, Freem. 52; *The Attorney-General* v. *Gains*, 11 Beav. 63. Nor, it seems, has a lessee any equity against his sub-lessee, who obtains a renewal from the head landlord without consulting him: *Maunsell* v. *O'Brien*, 1 Jones, 176, Exch. Rep. (Ireland).

A lessee, however, obtaining a renewal of a lease at an increased rent, or purchasing the reversion, is somewhat in the position of a partner or fiduciary with respect to a sub-lessee with whom he has entered into a *toties quoties* covenant to renew at a fixed rent or fine, and is bound either to renew upon the old terms or to convey the property to the sub-lessee upon proper terms. In *Evans* v. *Walshe*, 2 S. & L. 519, A., the defendant, the lessee of a corporation, underlet to the plaintiff at a certain rent, with a covenant to renew to him at the same rent, as often as the corporation should

renew to him. The corporation raised the rent payable by A. Lord *Redesdale* granted an injunction to restrain the defendant from proceeding in ejectment, observing, "that he considered the defendant as bound to renew on the old terms, unless he chose to abandon the property, and allow the plaintiff to stand in his place for the renewal which he had obtained, which, as he had not covenanted to renew with the corporation, he might perhaps be at liberty to do. But if he thought fit to retain the benefit which he had obtained, he was bound specifically to execute his covenant for renewal."

Upon the same principle, in *Postlethwaite* v. *Lewthwaite*, 2 J. & H. 237, the defendants, lessees for lives from a Dean and Chapter, without a covenant for perpetual renewal, granted an underlease to the plaintiff for the same lives, of part of the premises, and covenanted that so often as they renewed their lease, they would add the same life to the plaintiff's lease, on the payment of a fixed fine, such new lease to contain such or the like rents, covenants, and provisoes as the former lease. The reversion having become vested in the Ecclesiastical Commissioners, they refused to renew, but offered to sell, and the lessee purchased the reversion. Sir *W. Page-Wood*, V.-C., acting upon the principles laid down by Lord *Redesdale* in *Evans* v. *Walshe*, made the following decree: "The defendants offering to convey the reversion in fee simple of the premises comprised in the plaintiff's lease, in preference to granting a new lease of the premises with a covenant for perpetual renewal and otherwise on the terms of the present lease, declare that the plaintiff is entitled to have such reversion conveyed to him on the terms of paying the defendants a due proportion of the consideration paid or given by them, and of the expenses incurred by them, in purchasing the fee simple of so much of the property comprised in their original lease as they did purchase, regard being had to the existing interest of the plaintiff under his lease, and to the extent of the property therein comprised. Then there must be an inquiry what this interest is worth." See *Pilkington* v. *Gore*, 8 Ir. Ch. Rep. 589; *Trumper* v. *Trumper*, 14 L. R. Eq. 295; 8 L. R. Ch. App. 870.

A lessee, moreover, cannot, by obtaining a new lease, omitting provisions contained in the former lease, and upon the faith of which he induced another person to take a sub-lease, act in contravention of such provisions to the injury of the sub-lessee. See *Piggott* v. *Stratton*, Johns. 341.

And where a trustee or a person in any degree holding a fiduciary position, who has acquired the legal possession of, and dominion over, an estate, subject to a cove-

nant for perpetual renewal, and who should so deal with the property as to make the renewal impossible, by his own act [illegible] for his own benefit, he is bound to give full effect to the charges on the trust estate, and to satisfy those charges out of the acquired estate, so far as might be necessary. See *Trumper* v. *Trumper*, 14 L. R. Eq. 295, 310; 8 L. R. Ch. App. 870.

ELLIOT *v.* [illegible] CRYMAN.

July [illegible]t, 1740, at t[illegible] Rolls.

S. C., 2 Atk. 4. [REPORTED BARNARDISTON'S CHANCERY REPORTS, 78.]

LIABILITY OF PURCHASER TO SEE TO THE APPLICATION OF HIS PURCHASE-MONEY.]—*A purchaser of personalty from an executor will not be held liable to see to the application of the purchase-money, except in cases of fraud.*

It is a general rule, that, where real estate is devised to trustees, upon trust to sell for payment of debts generally, the purchaser is not bound to see that the money is rightly applied. The same rule applies where real estate is not devised to be sold for the payment of debts, but is only charged with such payment.

If real estate is devised upon trust to be sold for the payment of certain debts, mentioning to whom in particular those debts are owing, the purchaser is bound to see that the money is applied for the payment of those debts.

THOMAS SMITH became indebted to several persons by bond, and likewise by simple contract. In three of those bonds Goodwin was bound with him as surety; and afterwards Goodwin gave his own bond alone to one of the creditors, to whom Smith was bound in a single bond. Smith, being thus indebted, made his will, and, in the beginning of it, says, "*my will is, that all my debts be paid; and I do charge all my lands with the payment thereof.*" Then came the clause, upon which, together with the other circumstances of the case, the present question principally determines. "*Item.*—I give all my real and personal estate to —— Goodwin, to hold to him, his heirs, executors, administrators, and assigns, *chargeable, nevertheless, with the payment of all my debts and legacies.*" Of this will he made Goodwin his executor.

The testator died in 1724; Goodwin proved the will, and in that same year sold a freehold estate of the testator's to Hunt; in the year following sold a leasehold estate of the testator's to Wright; and, in 1727, sold another estate of the testator's, consisting of both freehold and leasehold, to Merryman.

In the several deeds by which these estates were conveyed from Goodwin to the purchasers, the will of Smith was recited; and to one of those deeds Elliot, a creditor of Smith's, was a subscribing witness. These lands were sold in the neighbourhood by outcry. At the time of these sales, the creditors, all of them, either lived in the town where Goodwin lived, or within three or four miles of it. During all this time, and till the year 1730, the creditors went on regularly receiving their interest, which was at 5*l.* per cent., of Goodwin. Goodwin was a solvent man till 1732, and then he became a bankrupt.

In 1734 the present bill was brought by the creditors of Smith against the purchasers of these lands that have been mentioned, against Goodwin, and against the assignees under his commission, in order to have a satisfaction of their debts out of those lands which were sold by Goodwin.

Mr. *Chute* argued on the part of the plaintiffs, and for authority cited 2 Vern. 528 (*a*), 616 (*b*), *Pagett* v. *Hoskins*, in Precedents in Chancery (*c*), and the case of *Morley* v. *Webb*, determined by the present Chancellor [Lord *Hardwicke*].

Mr. *Idle*, on the same side, cited 2 Vern. 444 (*d*); and on the same side Mr. *Murray* cited the case of *Nuge* v. *Gifford* (*e*), determined by the present Chancellor.

Mr. *Brown* argued as counsel for Hunt and Wright, and for authority cited 2 Cha. Ca. 115 (*f*), and the case of *Abbot* v. *Gibbs* (*g*).

Mr. *Noel* argued on the same side, and cited 1 Vern. 45 (*h*), 411 (*i*), and Williams, 430 (*k*).

Mr. *Hoskins* argued as counsel for Merryman, and cited 1 Vern. 303 (*l*).

(*a*) *Chadwick* v. *Doleman.*
(*b*) *Crane* v. *Drake.*
(*c*) Prec. Ch. 431.
(*d*) *Humble* v. *Bill.* 1 Atk. 463.
(*e*) *Tulpepper* v. *Gifford.*
(*f*) 1 Eq. Ca. Abr. 358.
(*g*) *Newman* v. *Johnson.*
(*h*) *Clowdsley* v. *Pelham.*
(*i*) *Freemoult* v. *Dedire*, 1 P. Wms. 430.
(*k*) *Spalding* v. *Shalmer.*

The Hon. John Verney, M.R.—His Honor said, his opinion was that the plaintiffs were not entitled to the relief they sought by the bill. He said it was very true, that it was almost impossible to make a determination in the present case, but that it must fall out unfortunately on the one party or the other. The dispute arising between creditors on the one side, and purchasers on the other, both these sorts of persons are entitled to the favour of this Court; and in the present case a misfortune must fall upon one of them. On whom it is to fall is the question. And this is a question that must so frequently have happened, that it is extraordinary to find no determination directly in point.

The case is this:—Thomas Smith, being possessed of a real and personal estate, was indebted to several persons by bond, in three of which bonds Goodwin was bound with him as surety; and he had contracted likewise some other debts; and being thus indebted, he makes his will to the following effect. The will begins with this introduction:—"My will is, that all my debts be paid; and I do charge all my lands with the payment thereof. *Item*.—I give all my real and personal estate to —— Goodwin, to hold to him, his heirs, executors, administrators, and assigns, chargeable, nevertheless, with the payment of my debts and legacies." 'Tis indeed true that these words do not amount to a devise of the lands to be sold for the payment of the debts; and they only import a charge upon them for that purpose. However, this is such a devise as is within the meaning of the proviso of the Statute of Fraudulent Devises (3 W. & M. c. 14, repealed by 11 Geo. 4 & 1 Will. 4, c. 47), and does interrupt the descent to the heir-at-law. By this will the devisee was made executor.

The testator died in 1724. Goodwin paid interest for the debts at 5*l*. per cent. regularly till 1730. After the testator's death, three sales of this estate were made by Goodwin: one, of an estate which was entirely freehold; the other, of an estate entirely leasehold; and a third, consisting of freehold and leasehold both.

The bill in general is brought by the creditors of Smith against the purchasers, in order to have a payment of their debts out of the lands of Smith, which were sold to them by Goodwin.

With regard to the leasehold estate, the case is so extremely plain, that the sale of that must stand, and that the creditors cannot have a satisfaction out of it, that his Honor said it would be monstrous to call it in question. The executors are the proper persons that, by law, have a power to dispose of a testator's personal estate. 'Tis indeed true that personal estate may be clothed with such a *particular trust* (*a*), that it is possible the Court in some cases may require a purchaser of it to see the money rightly applied. But unless there is some such *particular trust* or a *fraud* in the case, it is impossible to say but the sale of a personal estate, when made by an executor, must stand; and that after the sale is made, the creditors cannot break in upon it.

(*a*) See *Bonney* v. *Ridgard*, 4 Bro. C. C. 130, 1 Cox, 145.

His Honor said, he would now consider the other sales that have been made, and would examine those, first upon the general rules of the Court, and in the next place upon the particular circumstances which this case is attended with.

With regard to the first of these matters, the general rule is, that *if a trust directs that land should be sold for the payment of debts generally, the purchaser is not bound to see that the money be rightly applied.* On the other hand, *if the trust directs that lands should be sold for the payment of certain debts, mentioning, in particular, to whom those debts were owing, the purchaser is bound to see that the money be applied for the payment of those debts.*

The present case, indeed, does not fall within either of these rules, because here lands are *not given to be sold for* the payment of debts, but *are only charged with such payment. However, the question is, whether that circumstance makes any difference. And his Honor was of opinion that it did not.* And if such a distinction was to be made, the consequence would be, that whenever lands

are charged with the payment of debts generally, they could never be discharged of that trust without a suit in this Court, which would be extremely inconvenient. *No instances have been produced to show that in any other respect the charging lands with the payment of debts differs from the directing them to be sold for such a purpose; and therefore there is no reason that there should be a difference established in this respect.* The only objection that seemed to be of weight with regard to this matter is, that where lands are appointed to be sold for the payment of debts generally, the trusts may be said to be performed as soon as those lands are sold; but where they are only charged with the payment of debts, it may be said that the trust is not performed till those debts are discharged. And so far, indeed, is true, that where lands are charged with the payment of annuities, those lands will be charged in the hands of the purchaser (*a*), because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund; but where lands are not burdened with such a subsisting charge, the purchaser ought not to be bound to look to the application of the money; and that seems to be the true distinction.

(*a*) Not, it seems, if there is also a charge of debts. See *Page* v. *Adam*, 4 Beav. 269.

Having thus considered the case under the general rule, his Honor said he would now consider it under the particular circumstances that attend it; and the particular circumstances are such as are far from strengthening the plaintiff's case, but rather the contrary.

One of those circumstances is the length of time the plaintiffs have lain by, without at all insisting on any charge upon these estates. Goodwin was a solvent man till his bankruptcy, in 1732. Here have been three purchases of these estates, made at different times—the one in 1727, the other two in 1725 and 1724. The first of them was made by Hunt, the second by Wright, and the third by Merryman. During all these transactions the plaintiffs do not mention one word of their charge upon this estate; but, on the contrary, regularly received their interest of Goodwin till the year 1730. It is indeed

true, that there is no express proof that the plaintiffs knew of these purchases, but there is reason to imagine that they did. The purchases were made in the neighbourhood by outcry; some of the creditors lived in the same town that Goodwin did; and all of them lived within three or four miles of him; and Elliot, one of the creditors, was a subscribing witness to one of the purchase-deeds. The want of notice, too, on the part of the purchasers, is a considerable circumstance in their favour. It is indeed true, that they had notice that there were debts chargeable upon this estate; but it does not appear they knew to whom those debts were owing. Another circumstance is, that Goodwin was a co-obligor in three of these bonds, and to another of the obligees he afterwards gave his bond alone, which may well be considered as a satisfaction for that bond. By this it appears that the creditors greatly relied upon Goodwin for their paymaster; and there is not much reason therefore that they should now be allowed to resort to the testator's estate.

Upon the whole, his Honor's opinion was, that the plaintiffs' bill must be dismissed; and even with costs, as against Wright, there being no manner of pretence for the plaintiffs to come upon that estate, it being all leasehold and sold to Wright by the executor, who by law is the proper person entrusted to dispose of the testator's personal estate. However, with regard to the rest of the defendants, his Honor said he would only dismiss the bill generally, without costs; and so he was pleased to decree accordingly.

Elliot v. *Merryman* is always cited as a leading case, wherever the question arises as to the liability of a purchaser to see to the application of his purchase-money. See *Bonney* v. *Ridgard*, 1 Cox, 147; *M'Leod* v. *Drummond*, 17 Ves. 162; *Shaw* v. *Borrer*, 1 Keen, 547; and *Colyer* v. *Finch*, 5 H. L. Cas. 923; where the rules laid down in that case were approved of and adopted.

It will be seen, on perusing the judgment of the Master of the

Rolls, that, in determining this question, the rules applicable to sales of real estate and to sales of personal estate are not identical. It will be convenient, therefore, to consider these rules as applied to the two species of property separately.

Before doing so, it may be useful to refer, in the first instance, to those statutes by which the law upon this subject has been altered or modified. It was enacted by the Act for Simplifying the Transfer of Real Property (7 & 8 Vict. c. 76, s. 10), taking effect from December 31, 1844, that the bonâ fide payment to, and the receipt of, any person to whom *any money* should be payable upon any express or implied trust, or for any limited purpose, should effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary should be expressly declared by the instrument creating the trust or security. This Act has, however, been repealed by the Law of Real Property Amendment Act (8 & 9 Vict. c. 106), which takes effect, as to this section of the repealed Act, from October 1st, 1845. With regard to wills executed whilst the Act 7 & 8 Vict. c. 76, was in force, such wills must be construed as having annexed to the trusts the incidents resulting from the then existing state of the law, and that the incidents of the trusts, as so defined, were not altered by the change in the law. 3 Dav. Conv. by Waley, 164.

By the Property and Trustees Relief Amendment Act (22 & 23 Vict. c. 35), which came into operation on the 13th August, 1859, it is enacted that "The *bonâ fide* payment to, and the receipt of any person to whom any *purchase or mortgage money* shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security" (sect. 23).

It will be observed that the 23rd section applies only to payments made by or to purchasers and mortgagees.

A more comprehensive power is given by Lord Cranworth's Act (23 & 24 Vict. c. 145), which enacts, that "the receipts in writing of any trustees or trustee, for *any money* payable to them or him, by reason or in the exercise of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof" (sect. 29).

A subsequent section, however,

enacts, that "the provisions contained in this Act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil, or other instrument executed after the passing of this Act (28th August, 1860), or under a will or codicil confirmed or revived by a codicil executed after that date" (sect. 34).

Although these Acts have rendered the subject of this note of less importance, nevertheless as they are not retrospective, it is still necessary to consider what the law is in cases not coming within their operation. Dart, V. & P. 596, 5th Ed.

First, as to Purchasers of Real Estate.]—It is clear that trustees in whom real property is vested, upon trust for sale, can *at law* give a valid discharge for the purchase-money, because they are at law the owners. *In equity*, however, the persons amongst whom the produce of the sale is to be distributed are considered the owners; and Courts of equity have therefore held that a purchaser must obtain a discharge from them unless the power of giving receipts is either expressly or by implication given to the trustees. If no such discharge is given, and the trustees have no power to give receipts, the estate, upon a misapplication of the purchase-money, will remain chargeable in the hands of the purchaser.

Where a power of giving receipts is in express terms conferred upon trustees, the purchaser will not, in cases free from fraud and collusion, be bound to see to the application of the purchase-money. Where, however, no such power is in *express* terms given, much difficulty arises in ascertaining the liability of the purchaser, which depends upon the question whether a power of giving receipts can be *implied*.

One of the rules laid down in the principal case, and which is invariably followed, is, *that, if the trust directs lands to be sold for payment of certain debts, mentioning in particular to whom those debts are owing, the purchaser is bound to see that the money is applied for the payment of those debts.* See *Dunch* v. *Kent*, 1 Vern. 261; *Culpepper* v. *Aston*, 2 Ch. Ca. 223; *Cotterell* v. *Hampson*, 2 Vern. 5; *Lloyd* v. *Baldwin*, 1 Ves. 173; *Ithell* v. *Beane*, 1 Ves. 215; *Doran* v. *Wiltshire*, 3 Swanst. 701; *Smith* v. *Guyon*, 1 Bro. C. C. 186; *Rogers* v. *Skillicorne*, Amb. 189; *Binks* v. *Rokeby*, 2 Madd. 238. The same rule is applicable also where there is a trust for payment of legacies or annuities, which, from their nature must be considered as specified or scheduled debts: *Johnson* v. *Kennett*, 3 My. & K. 630; *Horn* v. *Horn*, 2 S. & S. 448.

In cases coming within this rule, as the trusts are of a limited and definite nature, and such as a purchaser might without incon-

venience see properly performed, a power to give receipts cannot be implied.

Another rule laid down in the principal case is, "*that, if a trust directs the land to be sold for the payment of debts generally, the purchaser is not bound to see that the money be rightly applied;*" and it was, for the first time, decided, *that it makes no difference whether lands are given to be sold for the payment of debts or are only charged with such payment.*

The principle upon which this rule proceeds appears to be this: that, as it cannot be presumed that the settlor or testator could expect a trust of so general and unlimited a nature to be undertaken by a purchaser, it is implied that it was intended that the purchaser should be exempt from the necessity of seeing to the application of the purchase-money: *Williamson* v. *Curtis,* 3 Bro. C. C. 96; *Smith* v. *Guyon,* 1 Bro. C. C. 186, and Mr. Belt's note; *Balfour* v. *Welland,* 16 Ves. 151; *Shaw* v. *Borrer,* 1 Kee. 559; *Hardwicke* v. *Mynd,* 1 Anst. 109; *Barker* v. *Duke of Devon,* 3 Mer. 310; *Robinson* v. *Lowater,* 17 Beav. 592, 5 De G. Mac. & G. 272; *Dundas* v. *Blake,* 11 Ir. Eq. Rep. 138, 156; *Dowling* v. *Hudson,* 17 Beav. 248; *Storry* v. *Walsh,* 18 Beav. 559; *Glynn* v. *Locke,* 3 Dru. & W. 11, 22; *Ford* v. *Ryan,* 4 Ir. Ch. Rep. 342.

So, also, where there is a trust or charge for the general payment of debts, as well as for the payment of legacies or annuities, the purchaser will not be obliged to see to the application of the purchase-money; for, as Lord *Thurlow* observed, in *Jebb* v. *Abbott* (cited by Mr. Butler in his note on Co. Litt. 290, b), he cannot be expected to see to the discharge of legacies, which cannot be paid till after the debts. In *Beynon* v. *Gollins* (cited also by Mr. Butler in the same note), the testator had charged his estate with the payment of his debts generally, and with a legacy of £800 for his daughter for life, and after her death for her children. The trustee had joined in a conveyance of part of the estate to a purchaser, and permitted the £800 to come into the hands of the daughter's husband, and it was wasted. The bill was brought by the wife and children, to have the legacy made good by the purchasers of the estate, and against the trustee. It was dismissed against the purchasers. Upon the hearing for further directions, it was pressed by Mr. *Ambler,* that the trustee should pay the costs of the purchasers. But Lord *Thurlow* refused this, saying that, as there was a general charge of debts, the purchasers were not liable to see to the application of the purchase-money in payment of the £800, and that, if the plaintiff thought fit to make unnecessary parties, the trustees ought not to pay the costs of such parties, but that

they must receive them from the plaintiff. See also *Rogers* v. *Skillicorne*, Amb. 188; *Walker* v. *Flamstead*, 2 Ld. Ken. 2nd part, 57; *Dowling* v. *Hudson*, 17 Beav. 248.

In *Page* v. *Adam*, 4 Beav. 269, where a testator gave his real and personal estate to A., subject to the payment of his debts and certain annuities, it was argued, upon the authority of a dictum in the principal case, that annuity legacies charged upon land were different from other legacies, inasmuch as it was intended that they should continue a charge upon the land. However, Lord *Langdale*, M. R., held that A. could make a good title to the real estate without the concurrence of the annuitants, and that a purchaser from A. was not bound to see to the application of the purchase-money. "When," observes his Lordship, "an annuity is charged on land, and there *is no devise for the payment of debts, and no general charge of debts*, it must be deemed that the land was intended to be a constant and subsisting security for the payment of the annuity. But in the case of *Elliot* v. *Merryman*, where an expression to that effect is used, it was not considered, and the case did not require it to be considered, whether, in a case in which *both debts and annuities were charged*, the lands would be charged with the annuities in the hands of a purchaser from the person whose duty it was to sell for payment of debts; and the opinion of Lord *Eldon*, as stated in the note to *Jenkins* v. *Hiles*, 6 Ves. 654, n., is, 'that where a man by deed or will charges or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application of the purchase-money. It is just the same as if the specific bequests were out of the will.' Seeing no reason to differ from this opinion, and conceiving that an annuity legacy charged on the estate is, in the sense here used, a specific disposition, subject to the payment of debts, I do not think that the rule ought to be departed from by reason of the nature of the legacy. The reason on which the rule is founded operates precisely in the same manner, whether the legacies are of annuities, or of sums of money: and it would occasion very great inconvenience, if no sale of estates for payment of debts charged thereon could take place without the authority of a Court of equity, if the author of the charge for payment of debts had also charged the estate with the payment of legacies in the form of annuities. There are one or two cases (*Johnson* v. *Kennett*, 3 My. & K. 264; *Eland* v. *Eland*, 1 Beav. 235), in which legacies of annuities have not been distinguished from other legacies; but, as the point was not raised in those cases, I think they are not to be

relied on as authorities on the present occasion. But it appears to me that, on principle, and for this purpose, there is no substantial difference between the two kinds of legacy. The charge of debts is general, the amount is indefinite, and may exceed the whole value of the estate. It is the first duty of the executor, and of the devisee of the estate which is subject to the charge, to pay the debts; and for that purpose he is entitled to sell: if he sells, something or nothing may be left to secure payment of the annuities. The purchaser seems to have nothing to do with this; he cannot know or ascertain the amount of debts, and cannot, if he would, protect the annuitant. His title is derived under an authority or right to sell for payment of debts —a purpose which is paramount to the payment of annuities: and in respect of debts he is not bound to inquire." See *Johnson* v. *Kennett*, 3 My. & K. 624; *Eland* v. *Eland*, 1 Beav. 235; *S. C.*, 4 My. & Cr. 420.

And where there is a general charge of debts, it is immaterial that a particular debt is mentioned: *Robinson* v. *Lowater*, 17 Beav. 592, 5 De G. Mac. & G. 272.

Upon the same principle, in a recent case, where upon a dissolution of partnership the retiring partner by deed agreed to assign the partnership stock and effects to the partner continuing in the business, who covenanted to pay the debts and indemnify the retiring partner against them, it was held, by Sir *John Romilly*, M. R., that although the latter and his executors were entitled to pursue and specifically to apply towards the payment of the debts of the partnership any portion of the partnership property in the *possession of the former*, yet, as the case could not be put higher than one of an express trust to sell the property and apply the proceeds in payment of the debts of the partnership, they would not be entitled to do so while in the possession of a purchaser, even with notice of the deed, for he would not be bound to see to the application of the purchase-money. *In re Langmead's Trusts*, 20 Beav. 20, 7 De G. Mac. & G. 353. See *Jones* v. *Williams*, 24 Beav. 47.

Where there is a trust or charge for payments of *debts generally* and *legacies*, a purchaser, *even after the debts have been paid*, will not be liable to see to the application of the purchase-money in payment of the legacies: *Johnson* v. *Kennett*, 3 My. & K. 624; in this case the testator, subject to his debts and legacies, gave all his real and personal estate to his son absolutely, and the son thus became trustee for payment of debts and legacies, but, subject to the charge, he was owner. The estate was then settled by the son, who afterwards sold it: Lord *Lyndhurst*, in reversing the deci-

sion of Sir *L. Shadwell*, V.-C., observed, that it was said that the debts having been paid, and paid out of the personal estate, and nothing remaining but the legacies, the case fell within the general rule applicable to cases where legacies alone were charged upon the real estate. He found no authority for such a proposition; the rule applied *to the state of things at the death of the testator;* and if the debts were afterwards paid, and the legacies alone left as a charge, that circumstance did not vary the general rule. In *Eland* v. *Eland*, 4 My. & Cr. 429, Lord *Cottenham*, speaking of the rule, as laid down by Lord *Lyndhurst*, says, "I entirely concur in that opinion, otherwise the mortgagee must in every case in which there is a charge of legacies, ascertain whether the debts have been paid or not." See also *Page* v. *Adam*, 4 Beav. 269; and *Forbes* v. *Peacock*, 1 Ph. 717; in which case the testator charged his real estate with the payment of his debts, and directed it to be sold (but without saying by whom) upon the death of his wife, who was tenant for life if not sooner disposed of, and the proceeds, with the residue of his personal estate, to be divided among certain of his relations. The executors being thus empowered to sell the real estate, the surviving executor entered into a contract for that purpose with the defendant. Soon after the death of the widow (twenty-five years having elapsed since the testator's death), the defendant, by his solicitor, inquired whether there were any debts due from the estate which remained unsatisfied; and, if not, whether the cestuis que trust would give authority to sell. To this question no answer was returned. Sir *L. Shadwell*, V.-C., was of opinion that this, under the circumstances, amounted to notice to the purchaser that the debts were paid, and that he was therefore bound to see that the purchase-money was properly applied. See 12 Sim. 528. It followed, that the concurrence of the cestuis que trust was necessary to enable the purchaser to make a good title. Lord *Lyndhurst* reversed the decision of the Vice-Chancellor. "The estate," said his Lordship, "being charged in the first instance with the payment of debts, the defendant was not bound, according to the general rule, to see to the application of the purchase-money. If, indeed, he had notice that the vendor intended to commit a breach of trust, and was selling the estate for that purpose, he would, by purchasing under such circumstances, be concurring in the breach of trust, and thereby become responsible: *Watkins* v. *Cheek*, 2 S. & S. 599; *Balfour* v. *Welland*, 16 Ves. 151; *Eland* v. *Eland*, 4 My. & Cr. 420. But assuming that the facts relied upon in this case amount to notice

that the debts had been paid, yet, as the executor had authority to sell, not only for the payment of debts, but also for the purpose of distribution among the residuary legatees, this would not afford any inference that the executor was committing a breach of trust in selling the estate, or that he was not performing what his duty required. The case, then, comes to this: if authority is given to sell for the payment of debts and legacies, and the purchaser knows that the debts are paid, is he bound to see to the application of the purchase-money? I apprehend not. In the case of *Johnson* v. *Kennett*, where it was contended that the rule did not apply, because the debts had been paid before the sale took place, I held that the *rule had reference to the death of the testator;* and, therefore, that even supposing the debts were paid before the sale took place, and that the legacies alone remained as a charge, that circumstance would not vary the general rule."

In a note by the learned reporter appended to *Forbes* v. *Peacock*, he says, "If, notwithstanding this decision, it should still be inferred from the terms of the dictum in *Johnson* v. *Kennett*, that the rule would not apply to a case in which it should happen that there were no debts due at the testator's death, and that the purchaser knew it, I have the authority of Lord *Lyndhurst* for stating that he did not intend, on that occasion, to lay down any rule which should govern such a case; and that the guarded and somewhat qualified terms in which the dictum is referred to and adopted in this case, were used for the express purpose of excluding that inference." See 1 Ph. 722, n. Lord *St. Leonards*, however, in *Stroughill* v. *Anstey*, 1 De G. Mac. & G. 635, 654 (after commenting upon *Watkins* v. *Cheek*, 2 S. & S. 199; *Johnson* v. *Kennett*, 6 Sim. 384, 3 My. & K. 624; *Page* v. *Adam*, 4 Beav. 269: and *Forbes* v. *Peacock*, 11 Sim. 152, 1 Ph. 717, 721), with reference to what fell from Lord *Lyndhurst* in *Johnson* v. *Kennett* and *Forbes* v. *Peacock*, and the note of the reporter, makes the following useful observations: "I cannot think that a satisfactory settlement of this important point. The difference is this:—Lord *Lyndhurst* represents the Vice-Chancellor as saying that if there be a general charge of debts and legacies, the purchaser is absolved from seeing to the payment of the legacies on account of the charge of debts, but if the charge of debts has been satisfied, and the purchaser knows it has been satisfied, he is then in the same situation as if there was only an original charge of legacies, and he is bound to see to the application of the purchase-money; but to this Lord *Lyndhurst* answers, that the rule is different, and that if there is a

general charge of debts, the case must be taken as it stood at the death of the testator, and if there were debts then, although they were afterwards satisfied, the purchaser is not liable. Then he says, as I understand by the note, that he did not mean to decide that if there were no debts at the death of the testator, the purchaser was not bound. I cannot, however, follow that distinction. The case must stand upon one of two grounds: either that there are no debts within the knowledge of the purchaser (and then it is indifferent whether there were no debts at the death of the testator or no debts at the time of the purchase) or (which is more satisfactory and open to no ambiguity), on the ground that, when a testator by his will charges his estate with debts and legacies, he shows that he means to entrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them. It is by implication a declaration by the testator that he intends to entrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee. That intention does not cease because there are no debts; it remains just as much if there are no debts, as if there are debts, because the power arises from the circumstance that the debts are provided for, there being in the very creation of the trust a clear indication amounting to a declaration by the testator that he means, and the nature of the trust shows that he means, that the trustees are alone to receive the money and apply it. In that way all the cases are reconcilable, and all stand upon one footing, viz., that if a trust be created for the payment of debts and legacies the purchaser or mortgagee shall in no case be bound to see to the application of the money raised. This would be a consistent rule, on which everybody would be able to act, authorised, too, by the words of the testator, and drawing none of those fine distinctions which embarrass Courts and counsel, and lead to litigation; and it is one to which I shall adhere as long as I sit in this Court." 1 De G. Mac. & G. 652. And see *Carlyon* v. *Truscott*, 20 L. R. Eq. 348.

With reference to the ground upon which Lord *Lyndhurst* decided the case of *Johnson* v. *Kennett*, Lord *St. Leonards* said that it was not altogether satisfactory. "The son," said his Lordship, "being absolute owner of the estate, subject to the debts and legacies, was at liberty to settle it to uses for himself just as he thought proper, and when he sold he sold as owner as well as trustee, and a sale was no breach of trust: it was a sale by him in his proper character, but still subject in equity to the payment of the

debts and legacies. He stood in the same situation as an heir-at-law, who, being liable to the testator's debts, has power to dispose of the estate by sale, if he thinks proper, but is bound to apply the money that he receives from the sale in payment and satisfaction of the debts, and this Court will compel him to do so, and will not allow him to divert the money to other purposes." See *Stroughill* v. *Anstey*, 1 De G. Mac. & G. 650.

The liability to debts imposed by statute upon real estates of deceased persons, has not the same operation as a charge of debts by such persons, and a purchaser is still bound to see to the application of the purchase-money in payment of legacies charged on such estates. See *Horn* v. *Horn*, 2 S. & S. 448, where a trader devised his estates, subject to the payment of legacies, it was contended, that as the real estate of a trader was by the Debts of Traders Act, 47 Geo. 3, c. 74 (repealed, and the provisions thereof enlarged by 1 Will. 4, c. 47), subject to debts generally, the purchaser was discharged from the obligation to see that his money was applied in payment of the legacies, as he would have been if the estate had been charged by the testator with payment of his debts. However Sir *J. Leach*, V.-C., held, that the statute made no difference in this respect. The principle of this decision applies to Lord Romilly's Act, (3 & 4 Will. 4, c. 104,) which makes the real estates of all persons who die after the 29th of August, 1833, liable to simple contract debts. See *Shaw* v. *Borrer*, 1 Kee. 566, 577; *Ball* v. *Harris*, 4 My. & Cr. 268; *Jones* v. *Noyes*, 4 Jur. N. S. 1033.

Although there is no trust for the general payment of debts, it will be implied that it was the intention of the settlor or testator to confer upon the trustees a power to give receipts, where they are directed to sell at a time when the persons amongst whom they are to distribute the proceeds of the sale are either not ascertainable or not of age: thus, in *Balfour* v. *Welland*, 16 Ves. 151, where a general assignment for the benefit of certain scheduled creditors, and all other creditors executing the deed, was made to E. and F., upon trust, *as soon as conveniently might be*, to sell the assigned property, and *with all convenient speed* to make such dividends out of the proceeds among the creditors as therein mentioned; and the deed contained a provision limiting the time for creditors to execute the deed—*six months* for creditors in India, and *eighteen months* for those in Europe, unless they were disabled by minority, in which cases the same periods were to be allowed respectively *after the disability had ceased*—upon an objection being taken by a purchaser from the trustees to the title of a

leasehold house, on the ground that he was bound to see to the application of the money in satisfaction of the scheduled creditors and others coming within a limited time after the date of the deed, Sir *William Grant*, M. R., overruled the objection, upon the ground that the deed clearly conferred an *immediate* power of sale for a purpose that *could not be immediately defined*, viz. *to pay debts which could not be ascertained until a future and distant period.* "It is impossible," observed his Honor, "to contend, that the trustees might not have sold the whole property at any time they thought fit after the execution of the deed; and yet it could not be ascertained until the end of eighteen months who were the persons among whom the produce of the sale was to be distributed. If the sale might take place at a time when the distribution could not possibly be made, it must have been intended that the trustees should of themselves be able to give a discharge for the produce, for the money could not be paid to any other person than the trustees. It is not material, that the objects of the trust may have been actually ascertained before the sale. The deed must receive its construction as from the moment of its execution. According to the frame of the deed, the purchasers, were or were not liable to see to the application of the money; and their liability cannot depend upon any subsequent event." See also *Groom* v. *Booth*, 1 Drew. 548.

So, likewise, in *Sowarsby* v. *Lacy*, 4 Madd. 142, where A. devised certain lands to his children, the same to be sold when the executors and trustees of his will should see proper, and the purchase-money to be equally and severally divided amongst his children, some of whom were then infants, Sir *J. Leach* said, "It is plain the testator intended that the trustees should have an immediate power of sale. Some of the children were infants, and not capable of signing receipts. I must, therefore, infer, that the testator meant to give to the trustees the power to sign receipts, being an authority necessary for the execution of his declared purpose." See also *Lavender* v. *Stanton*, 6 Madd. 46; *Breedon* v. *Breedon*, 1 Russ. & My. 413; *Keon* v. *Magawly*, 1 D. & W. 401.

If, however, an estate is charged with a sum of money payable to an infant on his attaining his majority, the purchaser will be bound to see the money duly paid: *Dickenson* v. *Dickenson*, 3 Bro. C. C. 19.

Where money to arise from a sale is not merely to be paid to certain persons, but is to be applied by the trustees upon trusts requiring care and discretion, the presumption arises that the settlor intended to confide the execution

of the trust to the trustees solely, and the purchaser will not be bound to see to the application of the purchase-money. Thus, in *Doran* v. *Wiltshire*, 3 Swanst. 699, the trustees were to receive the purchase-money, and to lay it out in lands to the uses of the settlement, and till that was done to invest it in the Government funds. *Scott*, Solicitor-General, urged that no good title could be made, because there was no clause in the settlement making the receipt of the trustees a good discharge to the purchaser. But Lord *Thurlow* said, "As to the power which the trustees have of giving a discharge, it is true, that, when land is to be sold, and a particular debt is to be paid with it, the purchaser is bound to see to the application of the purchase-money. But in cases where the application is to a payment of debts generally, or to a general laying out of the money, he knew of no case which lays down, or any reasoning in any case which goes the length of saying that a purchaser is so bound; and, therefore, he conceived that the receipt of the trustees would be a good discharge in this case." See also *Balfour* v. *Welland*, 16 Ves. 151; *Tait* v. *Lathbury*, 35 Beav. 112; *Ford* v. *Ryan*, 4 Ir. Ch. Rep. 342.

An authority given by a testator to trustees to lay out and invest money upon good security is an authority to do all acts essential to that trust, and necessarily, therefore, to give sufficient discharges to borrowers of that money. *Wood* v. *Harman*, 5 Madd. 368.

Upon the same principle, where the trusts of a term were to raise a sum of money, but there was no express authority to give a receipt for such sum, it was implied by the Court, from authority having been given to invest the money, and vary the investment. For "it is not reasonable," as observed by Sir *J. Parker*, V.-C., "to suppose that the testator, giving the trustees authority to change the investments, and to convert them from time to time, had denied to them authority to receive the money." *Locke* v. *Lomas*, 5 De G. & Sm. 326, 329. See *Pell* v. *De Winton*, 2 De G. & J. 13.

Where, however, a testator gave a person like powers of sale and exchange as were contained in the will of another person, in which there were also powers to give receipts, the Court held that such person had not by implication a power to give receipts: *Cox* v. *Cox*, 1 K. & J. 251.

Where there is a charge for payment of debts generally, or a charge followed by specific dispositions of real estate, the purchaser is not bound to see to the application of his purchase-money; for, as before observed, the charge is equivalent to a trust, and the same effect will be given to it by a Court of equity, as if a direct devise had been made to trustees for payment

of debts. See *Walker* v. *Smallwood*, Amb. 676; *Jenkins* v. *Hiles*, 6 Ves. 654, note; *Bailey* v. *Ekins*, 7 Ves. 323; *Dolton* v. *Hewen*, 6 Madd. 9. In *Shaw* v. *Borrer*, 1 Kee. 559, a testator, after commencing his will with words amounting to a charge of his real estate with payment of his debts, devised an advowson to trustees, upon trust to present his youngest son to the living when vacant, and subject thereto, in trust to sell and apply the produce of the sale for the special purposes therein mentioned; and he devised his residuary real estate, upon certain trusts, to other trustees, and appointed three executors (who proved his will), one of whom was his youngest son, and another, one of the trustees of the advowson. The personal estate being insufficient for the payment of debts, the trustees of the advowson, one of whom was an executor, at the instance of the other executors, contracted to sell the advowson, before any vacancy had occurred in the living. In a suit for specific performance by the plaintiffs, the trustees of the advowson, and the executors, against the purchaser, it was held by Lord *Langdale*, M. R., that, the charge being in effect a devise of the real estate in trust for the payment of debts, a good title could be made by the plaintiffs, without the institution of a suit to ascertain the deficiency of the personal estate, and that the purchaser was not bound either to enquire whether other sufficient property ought first to be applied in payment of debts, or to see to the application of the purchase-money. "In discussing an authority," observed his Lordship, "cited in *Jenkins* v. *Hiles*, Lord *Eldon* is reported to have said, that if a man by deed or will charges or orders an estate to be sold for payment of his debts, and then makes specific dispositions, the purchaser is not bound to see to the application; it is just the same as if the specific bequests were out of the will. It seems, therefore, clear that a charge of this nature has been and ought to be treated as a trust, which gives the creditors a priority over the special purposes of the devise; and no doubt is raised but that, on the application of the creditors, the Court would, in a suit to which the executors were parties, compel the trustees for special purposes, to raise the money requisite for payment of the debts. If so, is there any good reason to doubt, but that the trustees and executors may themselves do that which the Court would compel them to do on the application of the creditors? Though the advowson is devised to trustees for special purposes, the testator has, in the first instance, charged all his estate with payment of his debts. The charge affects the equitable, but not the legal estate; and, upon the construction, the trusts of the will affect this estate, first, in common with the testator's other property

for the payment of debts, and next, separately, for the special purposes mentioned in his will." In *Ball* v. *Harris*, 4 My. & Cr. 264, Lord *Cottenham* held, that a charge by will of real estates with the payment of debts, generally, authorised a trustee, who was also executor, to whom, after imposing that charge, the testator had devised the estate, upon trusts for other persons, to make a mortgage (being a conditional sale) of lands purchased under a power and conveyed to him upon the trusts of the will, and exempted the mortgagee from liability to see to the application of the mortgage money. "The real question," observed his Lordship, "is, whether the decision in *Shaw* v. *Borrer* is right. I have carefully considered the judgment of the Master of the Rolls upon this point, and I entirely concur with him upon it; the point, indeed, has been long established. It arose directly in *Elliot* v. *Merryman*, and, as there laid down, has been recognised in the several cases referred to by the Master of the Rolls; to which may be added the opinion of Lord *Eldon* in *Bailey* v. *Ekins*, and *Dolton* v. *Ewen*; for, although the point in some of those cases was, whether the purchaser was bound to see to the application of purchase-money, the decision that he was not assumes that the sale was authorised by the charge in the will of the debts upon the estate; that is, that the charge of the debts upon the estate was equivalent to a trust to sell for payment of them." See also *Johnson* v. *Kennett*, 3 My. & K. 624; *Eland* v. *Eland*, 1 Beav. 235, 4 My. & Cr. 430; *Page* v. *Adam*, 4 Beav. 269; *Forbes* v. *Peacock*, 1 Ph. 717.

A purchaser is not bound to ascertain how much land it is necessary to sell for payment of debts, for, as observed by the Lord Keeper in *Spalding* v. *Shalmer*, 1 Vern. 303, "if more be sold than is sufficient to pay the debts, that shall not turn to the prejudice of the purchaser, for he is not obliged to enter into the account; and the trustees cannot sell just so much as is sufficient to pay the debts."

Where lands are devised to trustees upon *trust* to raise so much money as the personal estate shall fall deficient in paying the testator's debts and legacies, the purchaser is not bound to inquire whether the real estate is wanted or not. Secus if the trustees have a *power* merely to raise money upon the deficiency of the personal estate, for unless there was a deficiency the power never arose, and consequently the purchaser would take no estate by the supposed execution of it. See *Culpepper* v. *Aston*, 2 Ch. C. 115, 223; *Dike* v. *Ricks*, Cro. Car. 335; *Pierce* v. *Scott*, 1 Y. & C. Exch. Ca. 257; Butler's note to Co. Litt. 290, b.; *Bird* v. *Fox*, 11 Hare, 40.

In a recent case, where a tes-

tator "in case his personal estate should be insufficient for the payment of his debts," charged them upon his real estate; it was held by Lord *Romilly*, M. R., that the executor had an implied power to sell and give valid receipts for the purchase-money, without showing the insufficiency of the personal estate, although thirteen years had elapsed since the testator's death. *Greetham* v. *Colton*, 34 Beav. 615.

Where a trustee for the sale of real estate with power to give receipts and being entitled beneficially to a share of the proceeds of the sale, has judgments registered against him; it seems that a purchaser with notice of the judgments, may be bound to see to the application of the purchase-money in payment of the judgments. See *Drummond* v. *Tracy*, Johns. 610.

Where, however, a testator gave all his *real and personal* estate to his daughter upon trusts for sale and conversion, and to hold the proceeds for herself and two others equally, with the usual receipt clause, and appointed her executrix; it was held by Sir *W. Page-Wood*, V.-C., that the daughter having married and afterwards sold the land, could, with her husband's concurrence, effectually discharge the purchaser, notwithstanding judgments registered against the husband between the date of the sale, and the completion. *Drummond* v. *Tracy*, Johns. 608.

The rule, that a purchaser is not bound, where the debts are charged generally, to see to the application of the purchase-money, "is," as observed by Lord *Cottenham*, "subject to this obvious exception: that, if a purchaser or mortgagee is a party to a breach of trust, it can afford him no protection. One obvious example is where a devisee has a right to sell, but he sells to pay his own debt, which is a manifest breach of trust, and the party who concurs in the sale is aware or has notice of the fact that such is its object:" *Eland* v. *Eland*, 4 My. & Cr. 427. See also *Rogers* v. *Skillicorne*, Ambr. 189; *Watkins* v. *Cheek*, 2 S. & S. 199; *Burt* v. *Trueman*, 6 Jur. N. S. 721; 8 W. R. (V. C. K.) 635; *Howard* v. *Chaffer*, 2 Drew. & Sm. 236.

Another example is where the power to sell the real estate is only in case of a deficiency of the personal estate, and the purchaser has notice that the personal estate is ample and that the debts have been paid, inasmuch as he has then notice that what is intended to be done is a breach of trust. *Carlyon* v. *Truscott*, 20 L. R. Eq. 351. This case is distinguishable from that of *Forbes* v. *Peacock*, (1 Ph. 717), ante, p. 75, as what Lord *Lyndhurst* there held was, that where there was a power to sell for payment of debts and legacies, then inas-

much as, if the property was sold for payment of debts, there was under the general rule an undoubted power to give receipts; the combining of legacies with debts implied also a power to give receipts even if the debts were paid.

The burthen of proving that a mortgagee or purchaser had such notice lies upon a creditor of the testator who impeaches the validity of the mortgage or purchase. *Corser* v. *Cartwright*, 8 L. R. Ch. App. 97; 7 L. R. Ho. Lo. 731. *Oram* v. *Richardson*, Weekly Notes, 27 Jan., 1877, p. 13.

Mere absence of statement of the purpose for which the money obtained by the sale or mortgage is to be used, will not make the purchaser or mortgagee liable, on the ground of a presumed knowledge that the money was to be applied otherwise than for the payment of the testator's debts. (*Ib.*)

And the fact that an executor, who is also devisee, has mortgaged his private property together with the property devised to him charged with payment of debts, will not raise a presumption against him, that he was not acting in the ordinary discharge of his duty as executor. *Barrow* v. *Griffith*, 13 W. R. (V. C. S.) 41; 11 Jur. N. S. 6.

So, where trustees, instead of selling under a power in a will, raise money by mortgage in a manner not authorised by the power, many years after the death of the testator, the mortgagee being party to a breach of trust, his security will be invalid. Thus, in *Stroughill* v. *Anstey*, 1 De G. Mac. & G. 635, where a testator by his will, after appointing three persons his executors, gave to them the residue of his personal estate, and directed them, or the other trustees to be appointed under the provisions contained in his will, to stand possessed of his residuary personal estate, upon trust at such time or times as to them should seem meet, to sell and convert into money all such part thereof as should not consist of money, and invest the produce in securities, and to stand possessed of the same, upon trust thereout to pay his funeral expenses and debts, and certain large legacies which he specified, and to stand possessed of the residue for his two sons equally; and the will contained a clause which, according to the construction put upon it by the Court, empowered the trustees to give receipts. *Sixteen* years after the death of the testator, the then acting trustees of the will, who were not the executors, raised money *upon a deposit of the title-deeds* of two leasehold houses, part of the testator's residuary estate. It was held by Lord *St. Leonards*, C., dismissing a claim filed by the mortgagees to enforce their securities, that inasmuch as the trusts of the will showed a

conversion, out and out, of the testator's property, to be absolutely necessary, the trustees were not authorised in raising money by mortgage. In giving judgment, his Lordship made the following important observations upon the subject, whether a power of sale authorises a mortgage:—"The first question," said his Lordship, "is, whether a mortgage was or was not authorised by the trusts of this will. And in addressing myself to this point, it ought, I think, to be considered, that in a case where trustees have a legal estate, and are to perform a particular trust through the medium of a sale, although a direction for a sale does not properly authorise a mortgage, yet where the circumstances would justify the raising of the particular charge by a mortgage, it must be in some measure in the discretion of the Court whether it will sanction that particular mode or not. It may be the saving of an estate, and the most discreet thing that can be done; and as the legal estate would go, and as the purposes of the trust would be satisfied, I think it impossible for the Court to lay down, that in every case of a trust for sale to raise particular sums, a mortgage might not, under circumstances, be justified. As a general rule, however, there can be no difficulty in saying, that a mortgage under a mere trust for conversion, out and out, is not a due execution of that trust; and looking at the nature of the property in the present case, which was leasehold, and which, as being varying property, would, as a matter of course, be directed to be converted into money, where, under a general gift, it was to go to different parties, having different interests, it is impossible to say that this Court could allow the property to remain unconverted under an absolute trust for conversion out and out; and the trustees to deal with it, as if it were property that was to be enjoyed in specie. In the present instance, the trustees went on, receiving the rents, and accounting to the persons who were entitled to the benefit of the purchase-money of the property producing the rents; and this was done where the will contained a trust that, with all convenient speed after the testator's death, the property should be converted out and out, not simply for the purpose of paying a charge, which might be more conveniently raised by a mortgage, but for the purpose of conversion. One of the objects of conversion was to pay debts; but there were other and final objects which rendered a conversion out and out absolutely necessary; namely, the dedication of the trust-monies to raise particular sums according to the testator's will; and, therefore, to continue the property unconverted was to set aside the testator's will instead of executing the trusts of it; and if the trusts had been properly

executed, the fraud which has been perpetrated could not have taken place." See also, *M'Neillie* v. *Acton*, 4 De G. Mac. & G. 744; *Haldenby* v. *Spofforth*, 1 Beav. 390; *Raikes* v. *Hall*, cited 1 De G. Mac. & G. 646; *Mather* v. *Norton*, 16 Jur. 309, 21 L. J. Ch. 15; *Devaynes* v. *Noble*, 24 Beav. 87; *Colyer* v. *Finch*, 5 Ho. Lo. Ca. 923.

But the mortgagee in such case will be entitled to stand as a creditor on the produce of the estates, to the extent to which the mortgage money has been properly applied. *Devaynes* v. *Robinson*, 24 Beav. 86.

With reference to the distance *of time* that had elapsed from the death of the testator to the deposit of the deeds, his Lordship observed, "That people who deal with trustees raising money at a considerable distance of time, and without any apparent reason for so doing, must be considered as under some obligation to inquire, and look fairly at what they are about. I do not mean to encumber or to lessen the security of purchasers or mortgagees under trusts; but if for a great number of years a trust, such as that here, remains unperformed, and parties are found in possession and receipt of the rents of the trust property, and then an application is made of it without their concurrence by the trustees, it may place those who deal with the trustees in a situation of having it established that there was a breach of trust, of which they ought to have taken notice." *Stroughill* v. *Anstey*, 1 De G. Mac. & G. 654. See and consider, *Charlton* v. *Earl of Durham*, 4 L. R. Ch. App. 433.

Another exception is, where the purchaser has notice of a suit having been instituted, which takes the administration of the estate out of the hands of the trustee: *Lloyd* v. *Baldwin*, 1 Ves. 173; *Walker* v. *Smallwood*, Amb. 676.

It may be here mentioned, that a question may arise of this nature; assuming that trustees for sale have no power to give receipts, can they, by conditions of sale, compel a purchaser to be satisfied with their receipts alone? It seems that they can (*Groom* v. *Booth*, 1 Drew. 548), unless the conditions are framed so as to mislead the purchaser (*Ib.* p. 565); or the Court would, by enforcing specific performance, cause a breach of trust (*Ib.*); at all events, it has been held too late to take an objection to such a condition on exceptions, after a decree for specific performance, and the usual reference as to title. *Wilkinson* v. *Hartley*, 15 Beav. 183.

The difficulty arising from the absence of a receipt clause may sometimes be got rid of by proceedings under the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120; *Carlyon* v. *Truscott*, 20 L. R. Eq. 352), and sometimes by payment of money

into Court under the Trustee Relief Acts (10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74), (see *Cox* v. *Cox*, 1 K. & J. 251); but the application of this relief to the cases under consideration under the last-mentioned Acts is doubtful; and it has been decided that the purchaser of an estate subject to a pecuniary charge cannot avail himself of those Acts. *In re Buckley's Trust*, 17 Beav. 110.

Second, as to Purchasers of Personal Estate from Executors or Administrators.]—However personal estates may be bequeathed, it must be applied, in the first place, by the executors for payment of the debts of the testator, in a due course of administration. Upon the same principles, therefore, by which a purchaser of real estate, devised for the general payment of debts, is exempted from seeing to the application of the purchase-money, it is a general rule that a person who purchases or takes a mortgage of leaseholds or other personalty from an executor or administator is not bound to see to the application of the purchase-money. "After the sale is made, the creditors cannot," as observed by the Master of the Rolls in the principal case, "break in upon it." See *Bonney* v. *Ridgard*, 1 Cox, 145; *Scott* v. *Tyler*, 2 Dick. 725; *Mead* v. *Orrery*, 3 Atk. 240; *Andrew* v. *Wrigley*, 4 Bro. C. C. 125; *M'Leod* v. *Drummond*, 17 Ves. 154; *Keane* v. *Robarts*, 4 Madd. 357; *Ward* v. *Ward*, 4 Ir. Ch. Rep. 215; *Humble* v. *Bill*, 2 Vern. 444. The last-mentioned case, however, was reversed in the House of Lords, under the name of *Savage* v. *Humble*, 3 Bro. P. C. 5, Toml. ed., in the opinion of subsequent judges erroneously: *Ewer* v. *Corbet*, 2 P. Wms. 148; *Andrew* v. *Wrigley*, 4 Bro. C. C. 136.

The sale or mortgage of a chattel by an executor will be good against both the residuary pecuniary and specific legatees, as well as the creditors of the testator, whose remedy, in case of the misapplication of the money by the executor, will not be against the purchaser or mortgagee, but against the executor; nor will notice of the will or of the bequest contained in it be prejudicial to the purchaser or mortgagee. See *Burting* v. *Stonard*, 2 P. Wms. 150; *M'Leod* v. *Drummond*, 17 Ves. 163, 169; *Andrew* v. *Wrigley*, 4 Bro. C. C. 125; *Keane* v. *Robarts*, 4 Madd. 332, 357; *Gray* v. *Johnston*, 3 Law R. Ho. Lo. 1; *Berry* v. *Gibbons*, 8 L. R. Ch. App. 747.

In *Ewer* v. *Corbet*, 2 P. Wms. 148, one possessed of a term for years devised it to A., and died indebted, having made B. his executor. The executor sold the term, upon which the legatee of the term brought a bill against the purchaser, insisting that, the term being bequeathed to the plaintiff, the executor was but a trus-

tee, and that the purchaser must have notice of this trust, the term having been bought of the executor, and consequently must be taken subject to the trust. However, Sir *J. Jekyll*, M. R., observed, "I take it to have been resolved, and with great reason, that an executor, where there are debts, may sell a term, and the devisee of the term has no other remedy but against the executor to recover the value thereof, if there be sufficient assets for the payment of debts. As for the notice of the will and of the devise of the term to a third person, that is nothing; for every person buying of an executor, where he is named executor, must, of necessity, have notice; so that if notice were to be an hindrance, then, of consequence, no executor might sell. It is not reasonable to put every purchaser of a lease from an executor to take an account of the testator's debts, nor has he any means to discover them. On the contrary, as the whole personal estate of the testator is liable to the debts, this lease must (inter alia) of necessity be liable, and therefore may be sold by the executor. If equity were otherwise, it would be a great hindrance to the payment of debts and legacies, and would lay an embargo upon all personal estates in the hands of executors and administrators, which would be attended with great inconvenience." See also *Humble* v. *Bill*, 2 Vern. 445; *Watts* v. *Kancie*, Toth. 77.

The fact that a mortgage of part of the assets has been made to secure a debt originally contracted on the personal security of an executor, and without reference to the assets, is immaterial. See *Miles* v. *Durnford*, 2 De G. Mac. & G. 641, in which the Lords Justices differed as to this point from Sir *R. T. Kindersley*, V.-C. (See 2 Sim. N. S. 234.) "The only evidence," said Lord Justice *Knight-Bruce*, "is that the advances were originally made without security, and that security was afterwards added. That is a circumstance deserving attention, but it does not go far. It is not inconsistent with probability that the advances were made for *a purpose for which the executor might properly borrow* as executor. I think the presumption is in favour of the propriety of the transaction, and that the plaintiff wholly fails." See also *Haynes* v. *Forshaw*, 11 Hare, 93.

An executor or administrator may not only pledge or mortgage the assets, but may also give to the mortgagee of leaseholds a power to sell and give receipts for the purchase-money. See *Russell* v. *Plaice*, 18 Beav. 21. "The power of sale," said Sir *John Romilly*, M. R., in that case, "given to a mortgagee must, I think, be considered, not as the delegation of a power entrusted to the executor, which is a power to sell for the

benefit of his cestui que trust, but as the creation of a new power to sell, not for the benefit of the person interested in the testator's estate, but for the benefit of the person interested in the mortgage; that is, a power to render the mortgage effectual; and I think that the right to create this power is incidental to the authority of the executor to mortgage. If this were withheld, the persons interested in the assets would be injured, because in that case, a mortgage could not be effected, unless on terms less advantageous than could be obtained, if the person advancing the money obtained the same security as if he was dealing with the absolute owner of the estate. For the purpose of selling the estate of the testator, the executor is considered as the absolute owner, and has all the power incidental to that character. On what principle can it be maintained that he is not to be regarded in the same light, and to have the same power, for the purpose of effecting a mortgage, which may be the most beneficial course to be adopted for his cestui que trust, and of which benefit the executor is constituted the sole judge?" And see *Cruikshank* v. *Duffin*, 13 L. R. Eq. 555, where a mortgage with a power of sale by an executor to a Building Society was held good.

It has been held by the same learned judge that, where there is an express power to mortgage, the donee, as incident to such power, has authority to give a power of sale to the mortgagee. *Bridges* v. *Longman*, 24 Beav. 27; *Cook* v. *Dawson*, 29 Beav. 123, 128, 3 De G. F. & J. 127; *Leigh* v. *Lloyd*, 2 De G. J. & S. 330. *In re Chawner's will*, 8 L. R. Eq. 569; on this point overruling *Clarke* v. *The Royal Panopticon*, 4 Drew. 26, and *Sanders* v. *Richards*, 2 Col. 568. And now, by Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 11), powers of sale are rendered incident to mortgages.

But where an absolute purchase is held, in consequence of the relation between the parties, to be available as a security only, the Court will not import into the transaction a power of sale. *Pearson* v. *Benson*, 28 Beav. 598; and see *Darke* v. *Williamson*, 25 Beav. 622.

Where money was ordered by the Court to be raised by mortgage of an infant's estate for payment of debts and costs, the Court will, it seems, if the mortgagee requires it, authorise the insertion of a power of sale in the mortgage deed. *Selby* v. *Cooling*, 23 Beav. 418.

So likewise an executor may give to a person to whom he has assigned the book debts of the testator by way of mortgage, a power of attorney to collect the debts in his name. *Earl of Vane* v. *Rigden*, 5 L. R. Ch. App. 663.

If there be a specific legatee of

a chattel, it is desirable to have his concurrence to a sale of it, as the executor may have done some act amounting to an assent (*Thomlinson* v. *Smith*, Rep. temp. Finch, 378), but the difficulty does not arise when he is also executor. *Cole* v. *Miles*, 10 Hare, 179; *Taylor* v. *Hawkins*, 8 Ves. 209; *Attorney-General* v. *Potter*, 5 Beav. 164.

If the executor or other person who by reason of a charge of debts and legacies could make a good title, convey to the devisee or other person entitled to the property subject to the charge by deed, reciting the payment of the charge, out of the personal estate, a purchaser from such devisee or other person will not be bound to see to the application of the purchase-money. *Storry* v. *Walsh*, 18 Beav. 559. See also *Forshaw* v. *Higginson*, 26 L. J. N. S. Ch. 174, 8 De G. Mac. & G. 827.

Although an executor has power to give a person advancing money to him a lien on specific assets, he cannot enable a person from whom he obtains a loan to stand as a creditor upon or to prove against the estate in competition with the creditors of the testator. See *Farhall* v. *Farhall*, 7 L. R. Ch. App. 123, reversing S. C. 12, L. R. Eq. 98.

The Master of the Rolls, in the principal case, mentions two exceptions from the rule. As to the first, he observes, "that personal estate may be clothed with such a particular trust, that it is possible the Court, in some cases, may require a purchaser of it to see the money rightly applied." This observation has been approved of by Lord *Kenyon*, M. R. in *Bonney* v. *Ridgard*, 4 Bro. C. C. 130; 1 Cox, 145. See *M'Leod* v. *Drummond*, 17 Ves. 161, 162; *In re Johnston's Estate*, 15 Ir. Ch. Rep. 260.

The second exception from the rule, mentioned by the Master of the Rolls, is, where there is a fraud in the case on the part of a purchaser or mortgagee, which fraud will be inferred in many instances. Thus, where an executor disposes of or pledges his testator's assets in payment of or as a security for a debt of his *own*, the person to whom they are disposed of or pledged will take them subject to the claims of the creditors, specific and general legatees, of the testator: thus, in *Hill* v. *Simpson*, 7 Ves. 152, Simpson, an executor, immediately after the death of his testatrix, Mrs. Smith, transferred certain funds standing in the name of John Smith, her deceased husband, to whom she was executrix, and other funds standing in her name and in the name of her co-executor, to Moffatt & Co., his bankers, as a security for such sums as he then owed, or might afterwards owe them. Moffat & Co. denied that they knew, or suspected, that the funds were not at the time of the trans-

fer the absolute property of Simpson, as executor or devisee of Mrs. Smith; or that they were part of the personal estate of John Smith; on the contrary, they believed they were Simpson's own property; and he represented to them that he was absolutely entitled thereto subject only to an annuity of 20*l.* to Elizabeth Smith's sister during her life, and to a few very small legacies: that he had full right to dispose thereof, and would have disposed thereof but for the low price of the funds, which he expected would rise. They also stated that they did not know any of the legacies of John Smith to the plaintiffs, or any other person, were unpaid. However, Sir *W. Grant*, M. R., held that the general legatees could follow the funds transferred to the bankers. "In this instance," observed his Honor, "the assignment was made in less than a month after the death of Mrs. Smith. There is not, therefore, the least ground for the presumption of right acquired to the assets of Mr. or Mrs. Smith by payments made in that short interval on account of either estate. It is not pretended it was to satisfy any claim on either estate; for the express purpose appears to have been to secure a debt of his own, which he already owed to the bankers, and other advances they were to make by taking up bills of his then actually outstanding. They had distinct notice, therefore, that the money was not to be applied to any demand upon either estate; but the assets were to be wholly applied to the private purpose of the executor. Allowing every case to remain undisturbed, does it follow from any that an executor in the first month after the testator's death can apply the assets in payment of his own debt; and that a creditor is perfectly safe in so receiving and applying them, provided he abstains from looking at the will, which would show the existence of unsatisfied demands? I am for the moment keeping out of sight the representation made by Simpson, and supposing the question to be, whether an executor may thus deal and be dealt with; and it is clear, no rule of justice permits, or of convenience requires, that he should have, this unbounded power. Though it may be dangerous at all to restrain the power of purchasing from him, what inconvenience can there be in holding, that the assets, known to be such, should not be applied in any case to the executor's debt, unless the creditor could be first satisfied of his right? It may be essential that the executor should have the power to sell the assets; but it is not essential that he should have the power to pay his own creditor, and it is not just that one man's property should be applied to the payment of another man's debt . . .

It was gross negligence not to look at the will, under which alone a title could be given to them. It was not necessary to use any exertion to obtain information, but merely not to shut their eyes against the information which, without extraordinary neglect, they could not avoid receiving. No transaction with executors can be rendered unsafe, by holding that assets transferred under such circumstances may be followed." See also *Haynes* v. *Forshaw*, 11 Hare, 93; *Wilson* v. *Moore*, 1 My. & K. 337; *Wilson* v. *Leslie*, 5 W. R. (V. C. K.) 815; *Rolfe* v. *Gregory*, 11 W. R. (V. C. K.) 1016; *Farhall* v. *Farhall*, 7 L. R. Eq. 286.

A different doctrine appears to have formerly prevailed in *Mead* v. *Orrery*, 3 Atk. 235, and *Nugent* v. *Gifford*, 1 Atk. 463. The authority of these cases, however, is weakened, if they are not completely overruled, by *Hill* v. *Simpson*; and see *Bonney* v. *Ridgard*, 1 Cox, 145, where Sir *Lloyd Kenyon*, M. R., in commenting on *Mead* v. *Lord Orrery*, says, that if it had come before him, he should have decided it in direct opposition to that authority. It may be remarked, however, that in *Nugent* v. *Gifford* the executor was the sole residuary legatee; and in *Mead* v. *Lord Orrery* he was one of the residuary legatees, and his co-executors joined with him in the assignment. If, therefore, these cases are rightly decided, they seem to establish that where an executor is also residuary legatee, fraud or collusion will not necessarily be inferred as against the person to whom he sells or mortgages a chattel of the testator's in payment of or as a security for his own debt. See *M'Leod* v. *Drummond*, 17 Ves. 163, 164; *Bedford* v. *Woodham*, 4 Ves. 40, note; *Williams* v. *Massy*, 15 Ir. Ch. Rep. 47.

It is clear, that, in the absence of fraud or collusion, the assignment by an executor, as a security for his own debt, of a chattel specifically bequeathed to him, will be good: *Taylor* v. *Hawkins*, 8 Ves. 209.

A purchaser, however, with notice of the testator's debts being unpaid, will not be allowed to retain a chattel obtained from an executor as a security for his own debt, although the executor is also specific or residuary legatee; thus in *Crane* v. *Drake*, 2 Vern. 616, where the purchaser, with notice of the plaintiff's debt, bought a lease from the executor and devisee, upon an arrangement that part of the purchase-money was to go in payment of a debt due to him from the executor, it was held that the sale was not binding upon the plaintiff, the Lord Chancellor saying, "The defendant was a party, and consenting to and contriving a devastavit." In commenting on this case, in *Andrew* v. *Wrigley*, 4 Bro. C. C. 139, Lord *Alvanley*, M. R., observes, "Can there be a stronger

case of a devastavit, than an executor aliening the property of his testator to pay his own debts, and the alienee then knew that the plaintiff's debt was due?" See also *Nugent* v. *Gifford*, 1 Atk. 464; *M'Leod* v. *Drummond*, 17 Ves. 163.

So, where the executor has sold for an under-value, or to one who has notice that the testator had left no debts, or that all debts had been paid, a sale or mortgage of the personal estate by the executor will not be valid. *Ewer* v. *Corbet*, 2 P. Wms. 148; *Scott* v. *Tyler*, 2 Dick. 725; *Drohan* v. *Drohan*, 1 Ball & B. 185; *Rice* v. *Gordon*, 11 Beav. 265; and see *Stroughill* v. *Anstey*, 1 De G. Mac. & G. 635; *M'Mullen* v. *O'Reilly*, 15 Ir. Ch. Rep. 251; *Hall* v. *Andrews*, 27 L. T. R. (N. S) 195; 20 W. R. (V. C. W.) 799.

The exceptions from the general rule, that a purchaser from an executor is not bound to see to the application of the purchase-money, have been well summed up by Lord *Thurlow* in *Scott* v. *Tyler*, 2 Dick. 725. "If," observes his Lordship, "one concerts with an executor, by obtaining the testator's effects at a nominal price or at a fraudulent under-value, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, *or in any other manner*, contrary to the duty of the office of executor, such concert will involve the seeming purchaser, or his pawnee, and make him liable for the full value."

Length of time and acquiescence, as in the principal case, will prevent creditors and legatees from asserting their claims against purchasers, although the sale by the executor was attended with suspicious circumstances of fraud, and à fortiori against mesne purchasers: *Bonney* v. *Ridgard*, 4 Bro. C. C. 138, cited in *M'Leod* v. *Drummond*, 17 Ves. 165: *S. C.*, 1 Cox, 145.

And the fact of the legacies being contingent will be no sufficient excuse for the legatees lying by when they have such an interest as will entitle them to know what debts the testator owed, and what part of his estate had been applied in payment of them: *Andrew* v. *Wrigley*, 4 Bro. C. C. 135; *Rolfe* v. *Gregory*, 11 W. R. (V. C. K.) 1016; 4 De G. Jo. & Sm. 576.

In *Mead* v. *Lord Orrery*, 3 Atk. 235, Lord *Hardwicke* seems to think that residuary legatees are never permitted in any case to question the disposition which the executors have made of the assets —that creditors or specific legatees could only do so. However, in *Hill* v. *Simpson*, 7 Ves. 152, Sir *William Grant* decided that a mere pecuniary legatee could follow the assets into the hands of a third person. In *M'Leod* v. *Drummond*, 17 Ves. 169, Lord *Eldon* concurred in the principle

laid down by Sir *William Grant*. "I cannot conceive," said his Lordship, "why a creditor and a specific legatee should be able to follow the assets, and not a pecuniary or residuary legatee."

Upon the same principle as that applicable to the cases of sales by executors, a banker will not be liable for paying the cheque of his customer, being an executor, who misapplies the money, unless a misapplication thereof was intended by the executor amounting to a breach of trust of which the banker was cognisant. See *Gray* v. *Johnston*, 3 L. R. Ho. Lo. 1. There R. Gray & Co. acted as bankers to T. Johnston, who carried on business with his son-in-law under the style of Johnston & Mayston, but whose accounts with them were kept in his own name alone, and were unsettled at his death. He left a will, bequeathing all his property to the use of his wife for life, and after her death to be divided among their children as she might think fit. Part of the property consisted of life-policies, which were put into the hands of the bankers, together with the probate of T. Johnston's will, and they received the amount of the policies, made up their accounts, and, after deducting their own unsettled claims, declared a certain sum to remain due from themselves to the executrix. She continued her husband's business with his late partner, under the style of "Johnston & Mayston," and a new account was opened with the bankers in the name of the new firm, and she as executrix drew a cheque for the amount stated to be due to her, and paid it to the bankers to be credited to the firm of "Johnston & Mayston," and it was so credited and paid out, with other money on account of cheques drawn by the new firm. It was held by the House of Lords, reversing the decision of the Lord Chancellor of Ireland (*Brady*), that these circumstances were not in themselves sufficient to show that a breach of trust had been committed, and that the bankers knew the intention to commit it, so as to render them liable (in a suit by the children of the testator) to replace the money. "The relation," said Lord *Westbury*, "between banker and customer is somewhat peculiar, and it is most important that the rules which regulate it should be well known and carefully observed. A banker is bound to honour an order of his customer with respect to the money belonging to that customer which is in the hands of the banker; and it is impossible for the banker to set up a jus tertii against the order of his customer, or to refuse to honour his draft, on any other ground than some sufficient one resulting from an act of the customer

himself. Supposing, therefore, that the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a cheque for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the cheque; for if he did so he would be making himself a party to an inquiry as between his customer and third persons. He would be setting up a supposed jus tertii, as a reason why he should not perform his own distinct obligation to his customer. But then it has been very well settled, that if an executor or a trustee who is indebted to a banker, or to another person having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once not only abundant proof of this breach of trust, but participates in it for his own personal benefit . . . . . The question then resolves itself into one of fact. Can the payment of that money to the credit of the account of the new firm be properly treated as a payment for the benefit of the bankers, designed and intended to be the means of payment to the bankers of the debt that might be due to them on the new account? It would be impossible to say that any such thing was either designed or intended; and it would be equally impossible to say that any such thing was at once accomplished by means of the payment of the money to the credit of the new account. If it had been so accomplished, if a balance had been immediately struck, and the sum of money so paid in had been appropriated at once to the payment of the balance due on that account to the bankers, or if any other transaction had been made by which you might follow the money, and say that it was applied according to the agreement of the parties, directly and expressly in discharge of a debt due from the new firm to the bankers, then we should want no more to compel restitution from the bankers, and the case would fall within the ambit of well-settled and firmly fixed authorities. But it is impossible, I think, to credit the statement that this was a payment intended to be for the benefit of bankers, or that it was made by any collusion or fraudulent agreement between the bankers and the executrix in order that the bankers might derive a personal benefit therefrom." See also *Farhall* v. *Farhall*, 7 L. R. Eq. 286; *Barnes* v. *Addy*, 9 L. R. Ch. App. 244.

Whether a Charge of Debts authorises a Sale of Real Estate by Executors.]—The question has of late been much discussed, whether

a general charge of debts upon real estate authorises a sale by the executors. It is laid down broadly by Sir *L. Shadwell*, V.-C., in *Forbes* v. *Peacock* (12 Sim. 541; overruled upon another point, 1 Ph. 717), that "if a testator charges his real estate with payment of his debts, that, *primâ facie*, gives his executor *power to sell* the estate, and to give a good discharge for the purchase-money."

If the learned Vice-Chancellor meant, that such a charge gave a *legal* power to the executors to sell, the subsequent authorities render it necessary that his proposition should to some extent be modified.

The first case which it is important to notice is that of *Shaw* v. *Borrer*, 1 Keen, 559—there the will contained a general direction to pay debts, so expressed as to constitute a charge on all the testator's real estates; followed by a devise of a particular portion of the real estate to trustees for a special purpose, and a residuary devise of real estates for other special purposes. No suit had been instituted in equity to ascertain the deficiency of the personal estate to pay the debts; and the question was, whether the trustees and executors together could make a title to the purchaser of that part of the real estate which was devised to trustees for special purposes. It was argued, that such a sale could only be effected under the decree of a Court of equity for the administration of the testator's estate; but Lord *Langdale*, M. R., held that a good title could be made. "It seems to be clear," said his Lordship, "that a charge of this nature has been, and ought to be, treated as a trust, which gives the creditors a priority over the special purposes of the devise; and no doubt is raised but that, on the application of the creditors, the Court would, in a suit to which the executors were parties, compel the trustees, for special purposes, to raise the money requisite for the payment of the debts. If so, is there any good reason to doubt but that the trustees and executors may themselves do that which the Court would compel them to do on the application of the creditors?"

Shaw v. *Borrer* was approved of by Lord *Cottenham* in the case of *Ball* v. *Harris* (4 My. & Cr. 264), where he held that an executor, who was also trustee of the real estate for other persons, there being a general charge of debts, had power to sell or mortgage the estate. "I have," said his Lordship, "carefully considered the judgment of the Master of the Rolls in *Shaw* v. *Borrer* upon this point, and I entirely concur with him upon it. The point, indeed, has been long established. It arose directly in *Elliot* v. *Merryman*, and as there laid down, has been recognised in the several cases referred to by the Master of the Rolls; to which may be added

the opinions of Lord *Thurlow* and Lord *Eldon* in *Bailey* v. *Ekins* (7 Ves. 319, 323), and *Dolton* v. *Hewen* (6 Madd. 9); for although the point in some of those cases was, whether the purchaser was bound to see to the application of the purchase-money, the decision that he was not, assumes that the sale was authorised by the charge in the will of the debts upon the estate; that is, that the charge of the debts upon the estate was equivalent to a trust to sell for the payment of them."

Now, in the first of these cases, it will be observed that the trustees joined with the executors in the sale; and, in the second, that the executor was also trustee, so that, as no difficulty arose with respect to the conveyance of the legal estate, a good title could be made; in the first case, by the trustees and executors; and in the second case, by the executor acting in a double capacity alone.

In the case of *Gosling* v. *Carter*, 1 Coll. 644, the testator, after giving a *general direction* for payment of his debts, gave and bequeathed all his real and personal estate to his wife for life, with a direction to sell the same, and divide the proceeds after her decease; and he made his wife and another person executrix and executor. The executrix and executor sold the real estate by auction; and upon a bill filed by them against the purchaser, it was held by Sir *J. L. Knight-Bruce*, V.-C., that they had an implied power to sell the estate for payment of debts, but that the defendant ought not to be compelled to complete the purchase without a conveyance from the heir-at-law. "There is," said his Honor, "an implied power of sale, because the life interest of the wife is subject to the general charge for payment of debts; therefore, in a sense, and in a manner, there does exist a power of selling during the lifetime of the wife, there being debts, which fact is proved. And I am of opinion, that there is upon this will an intention exhibited, that a sale, if made, should be made by the executors, or one of them, and not otherwise. The next question is, whether this intention is expressed so as to create a legal power? in which case, the concurrence of the heir-at-law would not be necessary. I am of opinion this question is one of too great nicety and difficulty to decide against the purchaser. If he wishes the concurrence of the heir, he must pay, or not pay, for the discovery of the heir, according to his contract. Upon that I give no opinion. But I think that in this suit he is not to be compelled to take the title from the executor and executrix without the concurrence of the heir. I decide, therefore, without prejudice to the question, whether the heir is, or is not, a necessary party to the conveyance, that the executor and executrix, as debts

are admitted to have existed at the time of the sale, had power to sell." And see *Curtis* v. *Fulbrook*, 8 Hare, 25, 278.

The question was next considered at law in the case of *Doe* d. *Jones* v. *Hughes*, 6 Exch. 223; there a testator, after charging all his real and personal estate with his debts, funeral and testamentary expenses, and a legacy therein mentioned, subject thereto, gave and devised the rents and profits of all his messuages, farms, and lands, *except his Bala Houses*, to his wife for life, with remainder over to another person in fee. And he also bequeathed to his wife the whole of his personal estates, and appointed her sole executrix. It was held by the Court of Exchequer that the executrix had no implied power to sell or mortgage the Bala Houses (which descended to the heir) for the payment either of the debts or of the funeral or testamentary expenses or legacy. "Upon the argument of this case," said *Parke*, B., "the several authorities upon the subject were brought before us; and it was contended on behalf of the defendant, that the effect of a charge of the real estates with debts was to give to the executrix an implied power of sale. But upon a due consideration of all the cases, it is perfectly clear that not one of them bears out that proposition. One class of cases shows, that by a devise to trustees of the real estate charged with the testator's debts, the trustees have thereby imposed upon them the duty of raising money to pay those debts; for, as the estate is given to them, they can, through the means of the estate, raise money for the payment of those debts. Another class of cases decides, that if from the whole purview of the will it appears to have been the intention of the testator that his real estate should be sold, and the proceeds of that real estate are to be distributed for the purpose for which it is given, which the executors alone by law could perform, then there is an implied power given them by the will to sell the estate; and that the executor who is to distribute the money is to sell the estate. Several cases were cited which confirm this proposition, and amongst them is that of *Forbes* v. *Peacock*. But upon looking through the cases, not a single authority is to be found which says, that *a simple charge of* the estate with the payment of the debts does more than make a charge upon the estate in the hands of the devisee, if the estate is devised, or upon the estate in the hands of the heir-at-law, if the estate devolves upon him by the law of inheritance. . . . The estate is only subjected in the hands of the heir-at-law to a charge for funeral and testamentary expenses, and the charges attending the proof of the will, which the executrix must enforce through the medium of a Court of Equity;

and we therefore think the executrix had no power to sell or mortgage the estate. It is not within the principle of any of the cases in which it has been held there is an implied power of sale or mortgage." See also *Kenrick* v. *Lord Beauclerk*, 3 B. & P. 175; *Doe* v. *Claridge*, 6 C. B. 641.

The next case to be noticed, (apparently conflicting with *Doe* d. *Jones* v. *Hughes*) is the case of *Robinson* v. *Lowater* (17 Beav. 532): there a testator devised some messuages in Rutland Place to his daughter Elizabeth (since deceased) for life, with remainder to all her children living at her decease, and two closes in Sandfield to his son Richard for life, with remainder to the use of his children who should be living at his decease, as tenants in common, with a limitation over in the event of that remainder not taking effect. And he devised his estate at Arnold to his son Richard in fee charged with the payment of the sum of 200*l.* due on mortgage of his messuages devised to his daughter Elizabeth, and of the legacies therein mentioned, and with and to the payment *of his debts*, and funeral and testamentary expenses. But if his premises at Arnold should not be sufficient for that purpose, then he charged his closes at Sandfield with the payment of such deficiency; and he appointed his son Richard sole executor of his will. The testator by a codicil revoked the devise of the Arnold property to his son Richard. The will was proved by the executor, who exhausted the personal estates in payment of debts, except the mortgage debt charged on Rutland Place. He also sold the two closes in Sandfield to Nathaniel Sulley (in whom the legal estate in fee simple was vested as a trustee for the testator and his heirs). The purchaser had notice of the will. The defendant Lowater derived his title to Sandfield from Nathaniel Sulley. The plaintiffs, the children of the testator's daughter Elizabeth, filed a bill, insisting that the Sandfield property was still liable in the hands of the defendant Lowater to pay off the mortgage on the Rutland Place property, which still remained unpaid. The bill however was dismissed by Sir *John Romilly*, M. R., with costs. "The case of *Doe* d. *Jones* v. *Hughes* (6 Exch. 223)," said his Honor, "is relied upon to show, that the executor could not make a good title to sell, and had no authority to sell vested in him. I find it difficult to reconcile the decision in that case with the numerous authorities to be found on this subject in Chancery; amongst which I may refer to *Ball* v. *Harris* (4 My. & Cr. 264), where Lord *Cottenham* observes, that a charge of debts is equivalent to a trust to sell so much as may be sufficient to pay them; *Forbes* v. *Peacock* (12 Sim. 541), which, on this point is not af-

fected by the reversal of the decision (1 Ph. 717), and to the case of *Gosling* v. *Carter* (1 Coll. 644).

"Before the case in the Exchequer, I had considered the law to be, that a charge of debts on an estate devised, gave the executors an implied power of sale, because, to use the expression of Sir *J. Leach*, in *Bentham* v. *Wiltshire*, (4 Madd. 49,) the power to sell is 'implied, from the produce having to pass through their hands in the execution of their office, as in the payment of debts or legacies.' I am of opinion, therefore, that a good title was made to the purchaser Nathaniel Sulley, and that the defendants claiming under him are entitled to hold it, discharged from all claims in favour of the plaintiffs." This decision upon appeal was affirmed by the Lords Justices (5 De G. Mac. & G. 272). During the argument the Lord Justice *Knight-Bruce*, with reference to *Doe* d. *Jones* v. *Hughes*, put the following pertinent question; "Does that case deal with anything beyond the question of *the legal estate?* Can it govern the present, which is an application to a Court of equity to give effect to a charge?" Again, Lord Justice *Turner* asked; "Does a charge of debts amount to a direction to institute a Chancery suit? Would not that consequence follow from holding that the executor could not sell?" In giving judgment, Lord Justice *Turner* made the following observations: "The question is, how and by whom the money was to be raised. The purpose for which it was to be raised being to pay debts, it must have been in the contemplation of the testator that it would have to be raised *immediately*, but no power is given to the devisees to raise it; and the will containing a devise of a life estate, with contingent remainders over, it is impossible that, during the subsistence of those contingent remainders, the devisees could themselves raise it. On the face of this will, therefore, it was not the intention of the testator that the money should be raised by the devisees. Then who was to raise it? Surely the persons who would have to apply the fund. It seems to me, therefore, upon the whole scope of this will, without reference to the cases decided upon the subject, that in this case, at least, it was the intention of the testator that the money should be raised by the executor; and if by the executor, then the executor must be considered as invested with all the powers necessary to raise it. I think there is abundant reason for the conclusion at which the Master of the Rolls has arrived in this case." See also *Eidsforth* v. *Armstead*, 2 K. & J. 333; *Ogden* v. *Lowry*, 25 L. J. (Ch.) N. S. 198.

In *Wrigley* v. *Sykes*, 21 Beav. 337, a testator ordered all his debts, funeral and testamentary

expenses, and legacies "to be paid and discharged out of his real and personal estate." He then devised certain freehold messuages to trustees for a term of 500 years, upon the trusts thereinafter mentioned, and subject thereto to his five sons in fee, as tenants in common, *upon condition* that they should pay, in equal shares, certain specified legacies and annuities, and also all his mortgage and *other debts*. The *trusts* of the *term* of 500 years were declared to be, that if any of the sons should, thirty days after demand, refuse to pay his proportion of the legacies, annuities, mortgage, and other debts, the trustees should, out of the rents, of the share of such son levy such sums unpaid, and all costs; and he appointed his five sons executors. Thirty-three years after the death of the testator, the surviving executors sold the estate, as they alleged, to pay the debts. Sir *John Romilly*, M. R., held that they had power to sell, and decreed a specific performance against the purchaser. "I do not think," said his Honor, "that the creation of the term, which has a distinct and specified object, supersedes the general charge for payment of debts; which, in my opinion, gives the executors a power of selling the estate for payment of debts. And in that view of the case, I am of opinion, that this is a valid contract. It is very true that the Court will not compel a person to take a doubtful title; but if the Court is of opinion, upon due consideration of the question of law, that the title is good, the Court is bound so to hold, and it cannot, in my opinion, decline to do so because it is possible that when the case arises between the parties some other Court may come to an opposite or contrary conclusion; and, therefore, I am of opinion, that I am right, in this case, in compelling the purchaser to take what, in my opinion, is not a doubtful title. I shall certainly secure to the purchaser, as far as it is competent for the Court to do so, a good legal estate when the conveyance is made; but as I am of opinion that the executors had power to enter into the contract, which is not disputed, and as, in my opinion, the title is good, I must decree specific performance." See also *Sabin* v. *Heape*, 27 Beav. 553; *Bolton* v. *Stannard*, 6 W. R. (M. R.) 570; *Greetham* v. *Colton*, 34 Beav. 615, 11 Jur. N. S. 848.

The conclusion which may be drawn from these cases, seems to be this, that where there is a general charge of debts upon real estate, the executors have in *equity* an implied power to sell it, and they alone can give a valid receipt for the purchase money, but as they do not take by implication a legal power to sell, and cannot therefore convey the legal estate, (*Doe* d. *Jones* v. *Hughes*, 6 Exch. 223,) the persons in whom it is

vested (if it be not already in the executors by devise or otherwise) must concur with them in the conveyance. This conclusion reconciles all the cases in equity with the apparently conflicting authority of *Doe* d. *Jones* v. *Hughes*. See also *Hodkinson* v. *Quinn*, 1 J. & H. 303, 309; *Hooper* v. *Stratton*, 12 W. R. (V.-C. S.) 367.

Real estate in the hands of an alienee of a devisee, or heir-at-law, where there has been *no charge* of debts by a testator, is discharged from the debts, and the heir or devisee only remains personally liable (*Richardson* v. *Horton*, 7 Beav. 112; *Spackman* v. *Timbrell*, 8 Sim. 253; *Pimm* v. *Insall*, 1 Mac. & G. 449; *Kinderley* v. *Jervis*, 22 Beav. 1: *Jones* v. *Noyes*, 4 Jur. N. S. 1033; *Dilkes* v. *Broadmead*, 2 De G. F. & Jo. 566; *Hynes* v. *Redington*, 13 I. Ch. R. 206). But though there be no charge of debts, a conveyance to new trustees is not such an alienation under 3 Will. & M. c. 14, s. 7, as would prevent the interests so aliened from being affected by an execution at the suit of the creditors of the devisor (*Coope* v. *Cresswell*, 2 L. R. Ch. App. 112, 122); but a mortgage by an equitable tenant for life under the will is such an alienation pro tanto, that the creditors might proceed against the trustees and the heir, as a Court of equity would protect the interest of the mortgagee from execution. *Ibid.*

And it has been recently held by the Lords Justices, reversing the decision of *Hall*, V.-C., that an equitable mortgage by deposit of title deeds with a memorandum of charge, by a devisee, is an alienation which pro tanto prevents a creditor of the testator from subsequently obtaining a charge on the estate as assets under 3 & 4 Will. 4, c. 104. See *British Mutual Investment Company* v. *Smart*, 10 L. R. Ch. App. 567, overruling *Carter* v. *Sanders*, 2 Drew. 248.

An alienee who has not paid the purchase-money may, at the suit of the creditors of the testator or ancestor be restrained from parting with it (*Green* v. *Lowes*, 3 Bro. C. C. 217).

Where, however, there *is a charge of debts* upon real estate, a purchaser from the heir or devisee, or their alienee, cannot safely complete without either the concurrence of the executors, or without being satisfied that all the debts have been paid. See *Storry* v. *Walsh*, 18 Beav. 559; *Hope* v. *Liddell*, 21 Beav. 183. In *Austin* v. *Martin*, 29 Beav. 523, real estate was devised to A. B. and his heirs in trust to sell, with power to the trustee or trustees to give receipts for the purchase-money. A. B. was to pay the debts and hold the surplus on certain trusts, and he was appointed sole executor. A. B. having renounced and disclaimed, it was held by Sir *J. Romilly*,

M. R., that the heir-at-law, who had taken out administration, could sell the estate and give valid receipts.

The opinion among conveyancers, nevertheless, appears to be, that where, subject to a *charge of debts*, an estate is devised to persons either beneficially or as trustees for special purposes, a sale can be effected by the devisees alone; and Lord *St. Leonards*, in the last edition of his work on Vendors and Purchasers, with reference to the cases of *Robinson* v. *Lowater*, and *Wrigley* v. *Sykes*, says, "They have introduced considerable difficulty upon titles, by implying a power of sale in executors from a charge of debts, although the estate is devised to others. This is contrary to the received opinion. It would not be safe to rely on the authority of these cases." See an article in the "Jurist," vol. ii., N. S. 68. Sugd. V. & P., 13th ed. p. 545, n. (1). See also, Dart's V. & P. 618, 619, 620, 621, 5th ed.; 2 David. Con., 299 n., 985 n., 999 n., 3rd ed.

We must remember, however, that *Robinson* v. *Lowater* is stamped with the high authority of the Lords Justices of the Court of Appeal. See also *Hamilton* v. *Buckmaster*, 3 L. R. Eq. 323.

It is however clear that where an executor is also devisee of an estate *charged with payment of debts*, he will be able to give a valid title to it, as a *bonâ fide* purchaser or mortgagee may presume that he is dealing with it for the purpose of administration. Such purchaser or mortgagee therefore will not be bound to look to the application of the purchase-money. *Corser* v. *Cartwright*, 8 L. R. Ch. App. 971; 7 L. R. Ho. Lo. 731, 736.

Where there is an express trust for sale, at a particular period which has arrived, the trustees can sell, without the concurrence of the executors, who might previously have sold under the implied power arising from a general charge of debts. See *Hodkinson* v. *Quinn*, 1 J. & H. 303; there a testator, after a charge of debts, devised certain real estates, subject to the payment of his said debts, to trustees upon trusts for his daughters and their families, and after the death of the surviving daughter, upon trust to sell with power to give receipts, and to apply the proceeds after satisfying all encumbrances affecting the said real estates, upon certain trusts. The daughters being both dead, it was held on demurrer by Sir *W. Page-Wood*, V.-C., that the trustees could make a good title without the executors. "It would," said his Honor, "be a very serious conclusion to hold that this decision of *Robinson* v. *Lowater*, has rendered it possible for executors to sell after an actual alienation by devisees. None of the authorities have gone that length. They decide only that the executors have that power . . . . Irre-

spectively of the reasons afforded by this particular will, I should be inclined to hold generally, that any sale by trustees under a power, prior to an actual sale by executors, would be effectual. But in this will, even assuming that the executors have a complete legal power, when you find it prescribed as the duty of the trustees to exercise another power at a given period, for the express purpose (among others) of doing what the executors' power is intended to effect, it follows that a sale by the trustees must be completely effectual, and no executor could afterwards insist on the right under his implied power to disturb that sale."

The law upon this subject has been partially altered by 22 & 23 Vict. c. 35 (Property and Trustees Relief Amendment Act), *passed* 13*th August*, 1859, by which it is enacted, that "where by any will which shall come into operation after the passing of this Act, the testator shall have charged his real estate, or any specific portion thereof, with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money as aforesaid, by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest, and fix such period or periods of repayment, as the person or persons executing the same shall think proper" (sect. 14).

The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent, or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid (sect. 15).

If any testator who shall have created such a charge as is described in the fourteenth section, shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any) shall have the same or the like power of raising the said monies as is hereinbefore vested in the devisee

or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate (sect. 16).

Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections fourteen, fifteen, and sixteen of this Act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof (sect. 17).

The provisions contained in sections fourteen, fifteen, and sixteen, shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation *before the passing of this Act* (13th August, 1859); but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do (sect. 18).

By this Act, says a learned writer, the difficulty created by the decisions has been removed in two cases: 1st, by giving a devisee of the fee, who is a trustee for totally foreign purposes, a power to sell or mortgage for the satisfaction of the charge of debts; and, 2ndly, by giving the executor a power to sell or mortgage when the estate is cut up by successive limitations without the intervention of a trustee of the legal fee. But in cases where the testator died before the 13th August, 1859, or where there is a devise, subject to a charge of debts, to a beneficial owner in fee or in tail, or for all other the testator's interest in the estate, the Act leaves this question in the same doubt and perplexity as before. No testator, then, ought to create a charge of debts upon his real estate, without at the same time expressly creating a trust or power for giving effect to the charge, and without distinctly pointing out the persons by whom the trust or power is to be exercised: Hayes and Jarm. Conc. Forms of Wills, by Eastwood, p. 467.

As to what constitutes a charge of debts, see note to *Silk* v. *Prime*, vol. 2, post.

DERING *v.* EARL OF WINCHELSEA.

In the Exchequer. Feb. 8th, 1787.

[REPORTED 1 COX, 318.]

S. C., 2 B. & P. 270.

CONTRIBUTION BETWEEN CO-SURETIES.]—*The doctrine of contribution amongst sureties is not founded in contract, but is the result of general equity, on the ground of equality of burthen and benefit. Therefore, where three sureties are bound by different instruments, but for the same principal and the same engagement, they shall contribute.*

THOMAS DERING, ESQ., having been appointed collector of some of the duties belonging to the customs, it became necessary, upon such appointment, for him to enter into bonds to the Crown with three securities for the due performance of this office. Sir Edward Dering his brother, the Earl of Winchelsea, and Sir John Rous having agreed to become sureties for him, a joint and several bond was executed by Thomas Dering and Sir Edward Dering to the Crown in the penalty of £4000; another joint and several bond by Thomas Dering and the Earl of Winchelsea, and a third by Thomas Dering and Sir John Rous, in the same penalty of £4000; all conditioned alike for the due performance of Thomas Dering's duty as collector. Mr. Dering being in arrear to the Crown to the amount of £3883*l.* 14*s.*, the Crown put the first bond in suit against Sir Edward Dering, and judgment was obtained thereon for that sum; whereupon Sir Edward filed this bill against the Earl of Winchelsea and Sir John Rous, claiming from them a contribution towards the sum so recovered against him.

The cause had been argued at length in *Michaelmas* Term last, and now stood for judgment.

LORD CHIEF BARON EYRE.—This bill is brought by

one surety against his two co-sureties, under the circumstances (above mentioned). Mr. Dering's appointment, the three bonds, and the judgment against the plaintiff, are in proof in the cause; the original balance due, and the present state of it, are admitted.

The demand is resisted on two grounds: first, that there is no foundation for the demand in the nature of the contract; and, secondly, that the conduct of Sir Edward Dering has been such as to disable him from claiming the benefit of the contract, though it did otherwise exist. There is also a formal objection, which I shall take notice of hereafter.

I shall consider the second ground of objection first, in order to lay it out of the case. The misconduct imputed to Sir Edward is, that he encouraged his brother in gaming and other irregularities; that he knew his brother had no fortune of his own, and must necessarily be making use of the public money; and that Sir Edward was privy to his brother's breaking the orders of the Lords of the Treasury, to keep the money in a particular box, and in a particular manner, &c. This may all be true, and such a representation of Sir Edward's conduct certainly places him in a bad point of view; and perhaps it is not a very decorous proceeding in Sir Edward to come into this court under these circumstances. He might possibly have involved his brother in some measure, but yet it is not made out to the satisfaction of the Court that these facts will constitute a defence. It is argued that the author of the loss shall not have the benefit of a contribution; but no cases have been cited to this point, nor any principle which applies to this case. It is not laying down any principle to say, that his ill conduct disables him from having any relief in this court. If this can be founded on any principle, it must be that a man must come into a court of equity with clean hands: but when this is said it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal, as well as in a moral sense. In a

moral sense, the companion, and perhaps, the conductor of Mr. Dering, may be said to be the author of the loss, but, to legal purposes, Mr. Dering himself is the author of it; and if the evil example of Sir Edward led him on, this is not what the Court can take cognizance of. Cases, indeed, might be put, in which the proposition would be true. If a contribution were demanded from a ship and cargo for goods thrown overboard to save the ship, if the plaintiff had actually bored a hole in the ship, he would in that case be certainly the author of the loss, and would not be entitled to any contribution. But speaking of the author of the loss is a mere figure of speech, as applied to Sir Edward Dering in this case.

The real point is, whether a contribution can be demanded between the obligors of distinct and separate obligations under the circumstances of this case. It is admitted, that, if there had been only one bond in which the three sureties had joined for 12,000*l.*, there must have been a contribution amongst them to the extent of any loss sustained: but it is said, that that case proceeds on the contract and privity subsisting amongst the sureties, which this case excludes; that this case admits of the supposition that the three sureties are perfect strangers to each other, and each of them might be ignorant of the other sureties, and that it would be strange to imply any contract as amongst the sureties in this situation; that these are perfectly distinct undertakings without connexion with each other, and it is added, that the contribution can never be eodem modo as in the three joining in one bond for 12,000*l.*; for there, if one of them become insolvent, the two others would be liable to contribute in moieties to the amount of 6000*l.* each, whereas here it is impossible to make them contribute beyond the penalty of the bond. Mr. Madocks has stated what is decisive, if true, that nobody is liable to contribute who does not appear on the face of the bond. If this means only that there is no contract, then it comes back to the question whether the right of contribution is founded on contract.

If we take a view of the cases, both in law and equity, we shall find that *contribution is bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify it,* as in *Swain* v. *Wall,* 1 Ch. Rep. 149. In the register, 176 b, there are two writs of contribution—one inter co-hæredes, the other inter co-feoffatos; these are founded on the Statute of Marlbridge. The great object of the statute is, to protect the inheritance from more suits than are necessary. Though contribution is a part of the provision of the statute, yet in Fitzh. N. B. 338, there is a writ of contribution at common law amongst tenants in common, as for a mill falling to decay. In the same page, Fitzherbert takes notice of contribution between co-heirs and co-feoffees; and as between co-feoffees, he supposes there shall be no contribution without an agreement, and the words of the writ countenance such an idea, for the words are "ex eorum assensu;" and yet this seems to contravene the express provision of the statute. As to co-heirs, the statute is express; it does not say so as to feoffees, but gives contribution in the same manner. In *Sir William Harbert's case,* 3 Co. 11 b, many cases of contribution are put; and the reason given in the books is, that in æquali jure the law requires equality: one shall not bear the burthen in ease of the rest; and the law is grounded in great equity. *Contract* is never mentioned. Now, the doctrine of equality operates more effectually in this court than in a court of law. The difficulty in *Coke's Cases* was, how to make them contribute; they were put to their auditâ querelâ, or scire facias. In equity there is a string of cases, in 1 Eq. Ca. Ab., tit. "Contribution and Average." Another case occurs in Hargr. Law Tracts (*a*), on the right of the King on the prisage of wine. The King is entitled to one ton before the mast, and one ton behind; and in that case a right of contribution accrues, for the King may take by his prerogative any two tons of wine he thinks fit, by which one man might suffer solely. But the contribution is given of course on general principles, which govern all these cases.

(*a*) P. 120.

Now, to come to the particular case of sureties. It is clear that one surety may compel a contribution from another towards payment of a debt for which they are jointly bound. On what principle? Can it be necessary to resort to the circumstance of a joint bond? What if they are jointly and severally bound? What difference will it make if they are severally bound, and by *different* instruments, but for the *same* principal, and the *same* engagement? In all these cases the sureties have a common interest and a common burthen; they are joined by the common end and purpose of their several obligations as much as if they were joined in one instrument, with this difference only, that the penalties will ascertain the proportion in which they are to contribute; whereas if they had joined in one bond, it must have depended on other circumstances.

In this case, the three sureties are all bound that Mr. Dering shall account for the monies he receives. This is a common burthen. All the bonds are forfeited at law and in this court, as far as the balance due. The balance might have been so great as to have exhausted all the penalties, and then the obligee forces them all to pay; but here the balance is something less than one of the penalties. Now, who ought to pay this? The one who is sued must pay it to the Crown, as in the case of prisage; but, as between themselves, there shall be a contribution, for they are in æquali jure. This principle is carried a great way where they are joined in one obligation; for if one should pay the whole 12,000*l.*, and the second were insolvent, the third shall contribute a moiety, though he certainly never meant to be liable for more than a third. This circumstance, and the possibility of one being liable for the whole, if the other two should prove insolvent, suggested the mode of entering into separate bonds; but this does not vary the reason for contribution, for there is the *same* principal and the *same* engagement; all are equally liable to the obligee to the extent of the penalty of the bonds when they are not all exhausted. If, in the common case of a joint bond, no distinction is to be

made, why shall not the same rule govern here? As in the case of average of cargo in a court of law, qui sentit commodum sentire debet et onus. This principle has a direct application here; for the charging one surety discharges the other, and each therefore ought to contribute to the onus. In questions of average, there is no contract or privity in ordinary cases; but it is the result of general justice, from the equality of burthen and benefit. Then there is no difficulty or absurdity in making a contribution take place in this case, if not founded on contract, nor any difficulty in adjusting the proportions in which they are to contribute, for the penalties will necessarily determine this.

The objection in point of form, which I before mentioned, is, that the bill cannot be sustained, inasmuch as it has not charged the insolvency of the principal debtor, and that such a charge is absolutely necessary. As a question of form, it ought to have been brought on by demurrer; but, in substance, the insolvency of Mr. Dering may be collected from the whole proceedings, which strongly imply it; for the plaintiff appears to have submitted to the judgment, and the defendants have made their defence on other grounds.

On the whole, therefore, we think that the plaintiff is entitled to the relief he prays, and declare that the balance due from Thomas Dering being admitted on all hands to amount to the sum of 3883*l.* 14*s.* 8½*d.*, the plaintiff, Sir Edward Dering, and the two defendants, the Earl of Winchelsea and Sir John Rous, ought to contribute in equal shares to the payment of that sum, and direct that the plaintiff and defendants do pay in discharge thereof, each of them, the sum of 1294*l.* 11*s.* 7*d.*; and that on payment thereof, the Attorney-General shall acknowledge satisfaction on the record of the said judgment, and that the two bonds entered into by the Earl of Winchelsea and Sir John Rous be delivered up to them respectively. But this not being a very favourable case to the plaintiff, and the equity he asks being doubtful, we do not think it a case for costs.

"The principle," observed Lord *Redesdale*, "established in the case of *Dering* v. *Lord Winchelsea*, is universal, that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of the decision in *Dering* v. *Lord Winchelsea*; and in that case there was no evidence of contract;" *Stirling* v. *Forrester*, 3 Bligh, 59. See also *Craythorne* v. *Swinburne*, 14 Ves. 160, 165, 169; *Hartly* v. *O'Flaherty*, 1 Beat. 77, 78; *Ware* v. *Horwood*, 14 Ves. 31; *Mayhew* v. *Crickett*, and note, 2 Swanst. 189, 192; *Spottiswood's Case*, 6 De G. Mac. & G. 345, 371, 375; *Whiting* v. *Burke*, 10 L. R. Eq. 539; 6 L. R. Ch. App. 342; *In re MacDonagh Minors*, 10 I. R. Eq. 269; where the doctrine laid down in *Dering* v. *Lord Winchelsea* has been recognised and approved of.

Courts of common law, in modern times, have assumed a jurisdiction to compel contribution between sureties, in the absence of positive contract, on the ground of implied assumpsit; inasmuch as the principle of contribution being in its operation established, a contract might be inferred, upon the implied knowledge of that principle by all persons. This jurisdiction was convenient enough, in a case simple and uncomplicated, but attended with great difficulty where the sureties were numerous; especially since it has been held, that separate actions might be brought against the different sureties for their respective quotas and proportions. It was easy to foresee the multiplicity of suits to which that led: *Craythorne* v. *Swinburne*, 14 Ves. 164; *Cowell* v. *Edwards*, 2 B. & P. 268; see also 1 Saund. R. 264, n. (*a*), Williams's note (*b*).

In other respects, as will be hereafter seen, the jurisdiction at common law was much more confined and less beneficial than in equity. Thus, where there were several sureties, and one became insolvent, the surety who paid the entire debt could in equity compel the solvent sureties to contribute towards payment of the entire debt (*Peter* v. *Rich*, 1 Ch. Rep. 34; *Hole* v. *Harrison*, 1 Ch. Ca.

246; *S.C.*, Finch, Rep. 15,203; *Hitchman* v. *Stewart*, 3 Drew. 271; and see *The Mayor of Berwick* v. *Murray*, 25 L. J., N. S. (Ch.) 201; 7 De G. Mac. & G. 497); but at law he could recover no more than an aliquot part of the whole, regard being had to the number of co-securities: *Cowell* v. *Edwards*, 2 B. & P. 268; *Browne* v. *Lee*, 6 B. & C. 697; *S. C.*, 9 D. & R. 700. See also *Rogers* v. *Mackenzie*, 4 Ves. 752; *Wright* v. *Hunter*, 5 Ves. 927; *Batard* v. *Hawes*, 2 E. & B. 287. So, also, if one of the sureties died, in equity contribution could be enforced as against his representatives; but at law an action lay only against the surviving sureties: *Primrose* v. *Bromley*, 1 Atk. 90; *Batard* v. *Hawes*, 2 E. & B. 287.

It may here be observed that in all cases of contribution, the jurisdiction assumed by courts of law did not affect the original jurisdiction of courts of equity; *Wright* v. *Hunter*, 5 Ves. 794, and now under the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25, subsect. 11, where there is any conflict and variance between the rules of law and equity with reference to the same matter, the rules of equity shall prevail.

It is clear, as laid down by the Lord Chief Baron, in *Dering* v. *The Earl of Winchelsea*, that a surety may compel contribution from another for payment of a debt for which they are jointly or severally, or jointly and severally, bound by the same instrument: *Fleetwood* v. *Charnock*, Nels. 10; *Underhill* v. *Horwood*, 10 Ves. 226; *Craythorne* v. *Swinburne*, 14 Ves. 164. It was, however, decided for the first time in *Dering* v. *The Earl of Winchelsea* that there is no difference whether the parties are bound in the same or by different instruments, provided they are co-securities for the *same* principal and in the *same* engagement; and further, that there is no difference if they are bound in different sums, except that contribution could not be required beyond the sum for which they had become bound. In *Craythorne* v. *Swinburne*, 14 Ves. 169, Lord *Eldon* said that he argued *Dering* v. *The Earl of Winchelsea*, and that he was much dissatisfied with the whole proceeding and with the judgment; but he had been since convinced that the decision was upon right principles. "Lord Chief Baron *Eyre*," observed his Lordship, "in that case decided that this obligation of co-securities is not founded in contract, but stands upon a principle of equity." See also *Ware* v. *Horwood*, 14 Ves. 31; *Mayhew* v. *Crickett*, 2 Swanst. 192; *Stirling* v. *Forrester*, 3 Bligh, 596.

And it seems that the right of a surety to enforce contribution against co-sureties will not be affected by his ignorance at the time he became surety that they were also co-sureties; *Craythorne*

v. *Swinburne*, 14 Ves. 163, 165.

Where, however, sureties are bound by different instruments for distinct portions of a debt due from the same principal, if the suretyship of each is a *separate* and *distinct* transaction, the doctrine laid down in *Dering* v. *Lord Winchelsea* will not apply, and there will be no right of contribution among the sureties: *Coope* v. *Twynam*, 1 T. & R. 426; *Arcedeckne* v. *Lord Howard*, 27 L. T. Rep. (N. S.) 194, 20 W. R. 879, reversing the decision of Sir *R. Malins*, reported 20 W. R. 571.

A surety will in equity be entitled to interest from his co-sureties for the money which he has paid: *Lawson* v. *Wright*, 1 Cox, 275, 277; *Hitchman* v. *Stewart*, 3 Drew. 271; *Swain* v. *Wall*, 1 Ch. Rep. 149; *Petre* v. *Duncombe*, 15 Jur. 86. See, however, *Onge* v. *Truelock*, 2 Moll. 31, 42; *Bell* v. *Free*, 1 Swanst. 90; *Rigby* v. *M'Namara*, 2 Cox, 415.

And it has been held recently in Ireland, overruling the cases of *Onge* v. *Truelock*, 2 Moll. 42, and *Salkeld* v. *Abbott*, Hayes and Jones, 110, that where one of two sureties had paid the full amount of a receiver's recognizance, he was entitled to use the recognizance for the purpose of recovering out of the estate of his co-surety, not only one half of the sum so paid by him, but also interest thereon from the date of payment. *In re Swan's Estate*, 4 I. R. Eq. 209.

Although the principle of contribution is not founded upon contract, still a person may by contract qualify, or take himself out of the reach of, the principle or the implied contract. Thus, where three persons became bound for the principal debtor in an obligation, and agreed among themselves that, if the principal debtor failed to pay the debt, they would pay their respective parts; two became insolvent, and the third paid the money, and one of the insolvent sureties afterwards becoming solvent, he was held liable to contribute one-third only: *Swain* v. *Wall*, 1 Ch. Rep. 149; see also *Craythorne* v. *Swinburne*, 14 Ves. 165; *Coope* v. *Twynam*, 1 T. & R. 426; *Collins* v. *Prosser*, 1 B. & C. 682. So also a person may take himself entirely out of the principle, as where he becomes merely a collateral surety, by limiting his liability to payment of the debt upon the default of the principal and other sureties; and on a bill in such a case, filed for contribution, parol evidence is admissible to show what the real contract was, and to rebut the implied contract which equity raises in cases of contribution: *Craythorne* v. *Swinburne*, 14 Ves. 160, overruling *Cooke* v. ——, 2 Frem. 97; *S. C.*, 2 Eq. Ca. Ab. 223, pl. 1; see also *Hartley* v. *O'Flaherty*, L. & G., temp. Plunk. 217, where Lord *Plunket* says, "In the

case of A. undertaking that if the principal does not pay, and if B., who has already become security, does not pay, he, A., will pay, it seems perfectly clear that B., in that case paying the whole, would have no claim of contribution against A."

Sureties who have paid the debt are not only entitled to contribution from the other sureties, but also in the absence of any contract for a particular indemnity (*Cooper* v. *Jenkins*, 32 Beav. 337), to the benefit of any security which any of them may have taken from the principal debtor by way of indemnity: *Swain* v. *Wall*, 1 Ch. Rep. 149: and it is a general rule (subject, however, to some few qualifications) that *a surety is entitled to the benefit of all the securities which the creditor has against the principal*. Thus, if a surety join with the principal in a promissory note or bond, and the surety pays the debt, he will be entitled to have a transfer of any mortgage which the creditor may have taken for his debt. "I take it," says Lord *Eldon*, "to be exceedingly clear, if at the time a bond is given a mortgage is also made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee; and, as the mortgagor cannot get back his estate again without a conveyance, that security remains a valid and effectual security, notwithstanding the bond debt is paid:" *Copis* v. *Middleton*, T. & R. 231; see also *Hodgson* v. *Shaw*, 3 My. & K. 195; *Gayner* v. *Rayner*, cited in *Robinson* v. *Wilson*, 2 Madd. 434; *Yonge* v. *Reynell*, 9 Hare, 809; *Goddard* v. *Whyte*, 2 Giff. 449; *Brandon* v. *Brandon*, 3 De G. & Jo. 524; and it is immaterial that the surety is not aware of the existence of the mortgage: *Mayhew* v. *Crickett*, 2 Swanst. 191; *Scott* v. *Knox*, 2 Jones, 778.

Where a surety for a mortgagor pays off part of the mortgage debt, he is entitled as against the mortgagor to a charge on the estate, for the amount he has so paid: *Gedye* v. *Matison*, 25 Beav. 310.

A surety, however, for part of a debt, is not entitled to the benefit of a security given by the debtor to the creditor at a different time in a distinct transaction for another part of the debt. *Wade* v. *Coope*, 2 Sim. 155.

A surety who pays off a debt for which he became answerable is entitled not only to all the equities which the creditor could have enforced against the principal debtor, but also against all persons claiming under him. Thus in *Drew* v. *Lockett*, 32 Beav. 499, A. mortgaged his estate to C. and B. became A.'s surety for the debt. Afterwards A. mortgaged the estate to D. who had notice of the first mortgage. The first mortgage was afterwards paid off, partly by B. the surety, but D. got the transfer of the legal estate.

It was held by Sir *John Romilly*, M. R., that the surety still had priority over D. for the amount paid by him under the first mortgage as surety for A.

And if through neglect on the part of a creditor a security to the benefit of which a surety is entitled is lost, or not properly perfected, the surety will be discharged so far as regards the amount of the security so lost: *Strange* v. *Fooks*, 4 Giff. 408.

But where the creditor advances a further sum upon the security of the mortgage, the surety cannot compel the creditor to assign it to him, unless he pays off the further sum, as well as the sum for the payment of which he became surety: *William* v. *Owen*, 13 Sim. 597; but see *Bowker* v. *Bull*, 1 Sim. N. S. 29, and the remarks thereon in *Farebrother* v. *Wodehouse*, 23 Beav. 28.

And where separate debts are due upon distinct securities from the principal debtor to the creditor, the latter will not lose his right to tack, by the fact that a third party who has become surety for one of the debts, has either voluntarily or upon proceedings taken against him by the creditor, paid off such debt: see *Farebrother* v. *Wodehouse*, 23 Beav. 18. There the defendants lent A. B. at the same time two sums of 2000*l.* and 3000*l.* on distinct securities, and the plaintiff was surety for the first sum. It was held by Sir *John Romilly*, M. R., that the plaintiff, on paying the 2000*l.* was not entitled to have a transfer of the securities held for that sum, until the defendants had also been paid the 3000*l.*

But the right of the mortgagee in such cases to tack as against the surety may be affected by contract between the parties or by concealment or misrepresentation on the part of the mortgagee: see the remarks of Sir *John Romilly*, M. R., in *Farebrother* v. *Wodehouse*, 23 Beav. 22, 23, 25, 28; and *Bowker* v. *Bull*, 1 Sim. N. S. 29.

The right of the surety to have the benefit of the securities held by the creditor is derived from the obligation on the part of the principal to indemnify the surety: *Yonge* v. *Reynell*, 9 Hare, 818.

Courts of equity, it seems, would, at a very early period, compel assignments of securities to a surety to a much greater extent than in later times they took upon themselves to do. There is a very strong instance of the application of that equity in *Parsons* v. *Briddock*, 2 Vern. 608. In that case the principal had given bail in an action; judgment was recovered against the bail; afterwards the surety was called upon and paid; and it was held, that he was entitled to an assignment of the judgment against the bail. So that, though the bail were themselves but sureties as between them and the principal debtor, yet, coming in the room of the

principal debtor as to the creditor, it was held, that they likewise came in the room of the principal debtor as to the surety. Consequently that decision established that the surety had precisely the same right that the creditor had, and was to stand in his place. The surety had no direct contract or engagement by which the bail were bound to him, but only a claim against them through the medium of the creditor, and was entitled only to all his rights. See, however, *Hodgson* v. *Shaw*, 3 My. & K. 189, and *Armitage* v. *Baldwin*, 5 Beav. 278, where a creditor sued his principal debtor and recovered a judgment against him and the bail in the action. The surety thereupon "paid and satisfied" to the creditor the amount of the judgments, with interest and costs, and took an assignment thereof. Lord *Langdale*, M. R., held, that the judgment was discharged, and that the surety could not recover on the judgment against the bail. See also *Dowbiggin* v. *Bourne*, 2 Y. & C. Exch. Ca. 462.

Upon the same principle, although it was at one time thought that a surety paying off the debt of the principal, secured by their bond, was entitled to have from the creditor an assignment of the debt and of the bond by which it was evidenced or secured, the contrary was fully established in two cases decided by Lord *Eldon*, C., and Lord *Brougham*, C., where the whole subject was examined in a most elaborate manner. In *Copis* v. *Middleton*, 1 T. & R. 229, Lord *Eldon* said: —"It is a general rule, that, in equity, a surety is entitled to the benefit of all the securities which the creditor has against the principal; but then the nature of those securities must be considered. Where there is a bond merely, if an action was brought upon the bond, it would appear upon oyer of the bond that the debt was extinguished. The general rule, therefore, must be qualified by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor. In the case, for instance, where, in addition to the bond, there is a mortgage, with a covenant on the part of the principal debtor to pay the money, the surety paying the money would be entitled to say, 'I have lost the benefit of the bond; but the creditor has a mortgage, and I have a right to the benefit of the mortgaged estate which has not got back to the debtor.'" So also Lord *Brougham*, in *Hodgson* v. *Shaw*, 3 My. & K. 190, observes:— "The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has for the purpose of obtaining his reimburse-

ment. It is hardly possible to put this right of substitution too high; and the right results more from equity than from contract or *quasi* contract, unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. The doctrine of the Court in this respect was luminously expounded in the argument of Sir *Samuel Romilly* in *Craythorne* v. *Swinburne;* and Lord *Eldon*, in giving judgment in that case, sanctioned the exposition by his full approval. 'A surety,' to use the language of Sir *S. Romilly's* reply, 'will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that: and to avail himself of all those securities against the debtor.' I have purposely taken this statement of the right, because it is there placed as high as it ever can be placed, and yet it is quite consistent with the principle of *Copis* v. *Middleton*. Thus the surety paying is entitled to every remedy which the creditor has. But can the creditor be said to have any specialty, or any remedy on any specialty, after the bond is gone by payment? The surety may enforce any security against the debtor which the creditor has; but, by the supposition, there is no security to enforce, for the payment has extinguished it. He has a right to have all the securities transferred to him; but there are, in the case supposed, none to transfer—they are absolutely gone. He may avail himself of all those securities against the debtor, but his own act of payment has left none of which he can take advantage."

It was decided in *Copis* v. *Middleton*, contrary to what was formerly considered to be the law, that a surety, paying off the bond debt of the principal, was in the administration of his assets merely a simple contract, and not a specialty creditor. See also *Jones* v. *Davids*, 4 Russ. 277.

Where, however, a surety paid the debt due from a defaulter to the Crown, the Court of Exchequer would allow him to stand in the place of the Crown: *Regina* v. *Salter*, 1 H. & N. 274; *Regina* v. *Robinson*, Ib. 275, n.

According to the law of Scotland the surety has always been entitled to call upon the creditor for a surrender or assignment of all separate and collateral securities obtained by him for the debt, his right not being limited by the exception introduced or approved of by *Copis* v. *Middleton* and

Hodgson v. *Shaw*. "The equity and propriety of the Scottish rule" are by the Mercantile Law Commissioners stated to be "obvious, inasmuch as the surety obtains much aid in operating his relief from the hardship of having been compelled to pay another party's debt, and yet no detriment is thereby inflicted on any other party." (Mercantile Commission, Second Report, 1855, p. 13.) And, in accordance with their recommendation, the law of England upon this subject has been assimilated to that of Scotland by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), which enacts, that "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty; and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding at law or equity, in order to obtain from the principal debtor, or any co-security, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than a just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable." Sect. 5. See *Allen* v. *De Lisle*, 5 W. R. 158, V. C. S.

A debtor who has paid the whole debt, recovered under a judgment against himself and his co-debtors, has a right to an assignment of such judgment. See *Batchelor* v. *Lawrence*, 9 C. B. (N. S.) 543, where, in an action by a co-debtor against the judgment creditor, refusing to make such assignment, it was held by the Court of Common Pleas, that a plea that the plaintiff was taken in execution on the judgment, and the judgment was satisfied, by the payment of the plaintiff, was a bad plea. See also *Silk* v. *Eyre*, 9 I. R. Eq. 393.

The act is applicable to a contract made before the passing of

the act, where a breach of it has taken place and a payment has been made by a surety or co-debtor under such contract after the passing of the act: *Lockhart* v. *Reilly*, 1 De G. & Jo. 464; *In re Cochran's Estate*, 5 Law Rep. Eq. 209.

Where, however, a surety upon a second bond, given by him as a collateral security for a debt secured by the original bond of his principal, paid off the debt, he would, even under the old law, have been entitled to an assignment from the creditor of the original bond; for the original bond still remained as an existing security; and the surety, therefore, upon an assignment of it, ranked as a specialty creditor against the assets of the principal debtor. Thus, in *Hodgson* v. *Shaw*, 3 My. & K. 183, "A. and B. executed a joint and several bond, to secure a sum of money with interest to W. Subsequently to the deaths of A. and W., the executors of W. obtained from B. as principal, and from C. as surety, another bond, to secure a part of the money then due on the original bond, with interest. No payments were ever made in respect of the first bond; but after C.'s death the second bond was paid off out of C.'s estate, and his representatives thereupon procured the original bond to be assigned to them: it was held, in a suit to administer the estate of A., that C.'s representatives were entitled, by virtue of the assignment, to rank as specialty creditors of A.'s estate, in respect of the payments made by C. or his estate on the second bond, to the extent of the penalty in the assigned bond:" and see *Donc* v. *Walley*, 2 Exch. 198.

In many other cases, the surety paying the debt has been held to have a right to stand in the place of the creditor. Thus, although under the old Bankrupt law, unless the surety had paid the creditor *before* the bankruptcy of the principal, he could not prove under such bankruptcy (*Taylor* v. *Mills*, Cowp. 525; *Paul* v. *Jones*, 1 T. R. 599; *Ex parte Marshall*, 1 Atk. 130), nevertheless where the creditor had proved the debt against the estate of the principal, and the surety *afterwards* paid him the debt, the creditor was held a trustee of the dividends for the surety: *Ex parte Rushworth*, 10 Ves. 409; *Ex parte Turner*, 3 Ves. 243; *Paley* v. *Field*, 12 Ves. 435; *Wright* v. *Morley*, 11 Ves. 12; *Watkins* v. *Flanagan*, 3 Russ. 421. So a surety might compel the creditor to go in and prove the debt under the bankruptcy of the principal debtor, and if the surety paid the whole, the creditor would be a trustee of the dividends for him: *Ex parte Rushworth*, 10 Ves. 414.

A surety, moreover, as soon as his obligation to pay becomes absolute, has a right in equity to

be exonerated by his principal. Hence it has been held that a surety against whom the creditor had commenced an action had a right to set up by way of equitable defence a set-off due from the creditor to the principal debtor, arising out of the same transaction out of which the liability of the surety arose. See *Bechervaise* v. *Lewis*, 7 L. R. C. P. 372. See also *In re Jeffery's Policy*, 20 W. R. (V. C. M.) 857.

It has been held in bankruptcy that a surety for indemnity to a limited amount, having paid to the extent of his engagement, is only entitled to dividends upon proof by the creditor under the bankruptcy of the principal debtor, subject to a deduction of the proportion of dividend upon the residue of the debt proved, beyond that for which the surety was engaged, supposing that expunged: *Paley* v. *Field*, 12 Ves. 435; *Ex parte Turner*, 3 Ves. 243; *Ex parte Rushworth*, 10 Ves. 409.

This rule, however, does not apply to winding-up cases in which, where a surety is only surety for a part of a debt, and has paid that part, he is entitled to receive the whole of the dividend which the principal debtor pays in respect of such part of the debt: see *Gray* v. *Leckham*, 7 L. R. Ch. App. 680. There four directors of a company, by way of security for any balance which might be due from the company to a bank, gave the manager of a branch of the bank their promissory note for 2000*l.*, and the manager endorsed the note to the bank. The company was *wound up*. The bank proved in the winding up for 3,659*l.* as due by the company to the bank, and was declared entitled to a dividend of 1,051*l.* on that sum. The bank afterwards brought an action against one of the makers of the note, who paid the bank 2,067*l.* for the debt and interest due on the note. It was held by the Lords Justices, varying the decision of Sir *J. Bacon*, V. C., that the note being given in pursuance of the ordinary contract of suretyship, the surety who had paid the 2,067*l.* was entitled to receive from the bank a share of the dividend, bearing the same proportion to the whole dividend as the sum paid by him bore to the sum proved for by the bank.

It is not, however, unusual for contracts of guarantee to be expressly worded so as to shew that it is intended that such dividends may be kept by the creditor: *Midland Banking Company* v. *Chambers*, 4 L. R. Ch. App. 398.

As to the rights of sureties, although they may have paid the debt of the principal debtor *after his* bankruptcy, to prove against his estate, or stand in the place of the creditor who may have proved, see 49 Geo. 2, c. 121, s. 8; 6 Geo. 4, c. 168, s. 8; 12 & 13 Vict. c. 106 (the Bankruptcy Act, 1849), s. 173.

The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71) contains no provision upon this subject, but it is presumed by a learned author on bankruptcy that the right of sureties in such cases will depend upon the former enactments though now repealed. See Robson on Bankruptcy, 265, 3rd ed.

So, where executors pay a debt for which the testator was liable as surety for a legatee, they will have a lien upon the legacy for the sum so paid, in priority to a mortgagee of the legacy: *Willes* v. *Greenhill*, 29 Beav. 376.

It may be here mentioned that when an executor, who has joined as surety with his testator, pays the amount of the debt after the testator's death, he is entitled to retain the amount out of the testator's assets as against all creditors of equal degree: *Ex parte Boyd*, 13 W. R. (L. C.) 419. And a widow who has mortgaged her estate as a collateral security for the mortgage debt of her husband, will if she have not paid the debt before a decree to administer his estate, be entitled to retain as executrix an indemnity as surety as against the simple contract creditors only, inasmuch as her right to indemnity does not amount to a specialty debt: *Ferguson* v. *Gibson*, 14 L. R. Eq. 379, 386. It must, however, be remembered that under Hinde Palmer's Act (32 & 33 Vict. c. 46), in the case of persons dying on or after the 1st January, 1870, their debts by specialty and simple contract are payable *pari passu*.

Where a surety gets rid of and discharges an obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount, but can only claim what he has actually paid in discharge of the common obligation: *Reed* v. *Norris*, 2 My. & Cr. 361, 375.

FOX *v.* MACKRETH.
PITT *v.* MACKRETH.

12th May, and 10th, 12th, 13th, 23rd, 24th, 26th Nov. 1787, *and 7th, 8th, and 11th Dec.* 1788, *Linc. Inn Hall.*

[THE CASE AND ARGUMENTS ARE TAKEN FROM 2 BRO. C. C. 400. THE JUDGMENT FROM 2 COX, 320.]

S. C., 4 Bro. P. C., Toml. ed. 258. See Hargreave, Jur. Arg. 453, 526; Reg. Lib. 1788, A. fol. 64.

PURCHASE BY A TRUSTEE FOR SALE.]—*A Trustee for the sale of estates for payment of debts, who purchased them himself, by taking an undue advantage of the confidence reposed in him by the settlor, and previous to the completion of the contract sold them at a highly advanced price, decreed to be a trustee, as to the sum produced by the second sale, for the settlor.*

THIS cause came on by appeal from the Rolls.

The original bill was filed in June, 1781, by the plaintiff, James Fox, Esq., against Robert Mackreth, John Dawes, and John Baynes Garforth, Esqrs. The supplemental bill was by William Morton Pitt, Esq., and James Farrer, trustees of the estate and effects of James Fox, against the same defendants, to have the benefit of the former suit.

The material part of the prayer of the original bill was, that the sale of the plaintiff's estates in the county of Surrey, made to Thomas Page, Esq., might be declared to have been made in trust for the plaintiff, and that Mackreth and Dawes might be declared to be accountable to the plaintiff for what the estates were sold for to Page, and also for accounts of what was due to the defendants Mackreth and Dawes, and upon what securities; and that they might be decreed to deliver up the securities, the plaintiff offering that they should be at liberty to retain respectively, out of the purchase-monies of the estates, what should be found justly due to them from the

plaintiff, and an account of monies due to the defendants, on account of annuities granted by the plaintiff to the defendants, the plaintiff offering that the defendants should be at liberty to retain the sum found due out of the said purchase-monies.

The circumstances of the case made against the principal defendants, Mackreth and Dawes, as taken from the bill, answer, and evidence, appear to be these :—

That the plaintiff Fox, being seised in tail of an estate at Horseley and elsewhere, in the county of Surrey, subject to an estate for life, in some parts thereof, to his mother for her jointure in lieu of dower, and likewise seised or possessed of copyhold and leasehold estates in the same county, and also entitled to several other estates in expectancy or for life only, had, before he came of age, embarked in a very expensive course of life, and was reduced to great distresses, and, under these circumstances, had procured money by granting annuities, and engaging his friends who were of age, in bonds and judgments, for securing the payment of them; and his friends, being acquainted with his situation, proposed, that as soon as might be after he should attain his age of twenty-one years, he should suffer a recovery of the Surrey estate, which, or a competent part thereof, should be conveyed to trustees, to be sold for the payment of his debts, and redeeming the annuities for which he, and his friends on his behalf, had engaged; and he attained his age of twenty-one in the month of August, 1777, and was very soon afterwards (in the latter end of that or beginning of the next month) introduced to the defendant Mackreth (who usually supplied young men of fortune with money in their distresses), and, on account of the plaintiff's inability to make a security by mortgage, as a recovery could not be suffered till Michaelmas Term, it was agreed that the defendants, Mackreth and Dawes, should supply the plaintiff with the sum of 5100*l.*, upon the plaintiff's granting two annuities of 500*l.* and 350*l.* each for his life; that Dawes, on the 23rd of September, advanced the 5100*l.*, for which the following securities were executed:—A bond of that

date by the plaintiff, in the penal sum of 6000*l.*, for securing to the defendant Dawes an annuity of 500*l.*, for the life of the plaintiff; a warrant of attorney of even date to confess judgment on the said bond; and an indenture tripartite, between the plaintiff of the first part, Dawes of the second part, and Garforth of the third part, whereby lands in the county of York, of which the plaintiff was seised for life, were conveyed to Garforth, for securing the payment of the annuity of 500*l.* to Dawes. The annuity of 350*l.* was secured by a similar bond of the same date, warrant of attorney to confess judgment thereon, and a similar conveyance of the same lands to Garforth, for better securing the same. In the annuity of 500*l.*, Mackreth, in his answer, admitted he was interested with Dawes, but denied that he was so in that of 350*l.*

In Michaelmas Term, 1777, a recovery was suffered of the freehold part of the Surrey estates, by which they were vested (subject to the mother's estate for life in a part thereof) in Oliver Farrer, in trust to convey the same in such manner as the plaintiff should direct, Mr. Farrer having agreed to act as a trustee for the purpose of selling the same and discharging the debts, together with and under the direction of two of the plaintiff's friends (who appear to have been Lord Ligonier and Lord Grantley), if they could be prevailed upon to accept the trust. In December, 1777, the plaintiff, being threatened with an arrest for the sum of 2000*l.* by the holder of bills of exchange drawn by the plaintiff while at Paris, applied to the defendant Mackreth, who agreed to lend the plaintiff 3000*l.*, on mortgage of the Surrey estates; upon which mortgage-deeds, dated 22nd and 23rd of this month, were accordingly prepared and executed. At the time of the execution of these deeds, it was proposed that the defendant Mackreth should be a trustee with Farrer for payment of the debts and redeeming the annuities, when the defendant Mackreth proposed the defendant Dawes for that purpose, as being, from the course of his business, well acquainted with many of the persons who had purchased the plaintiff's other annuities, and could

assist in purchasing them at a cheaper rate than Mr. Farrer; which was assented to by the plaintiff, upon an assurance that nothing should be done without Mr. Farrer being consulted and approving thereof.

In the same month the plaintiff delivered to the defendant Mackreth a particular or rental of the estate in Surrey, made by Thomas Jackman, by which it appeared that the rents of the houses and cottages on the premises amounted to 283*l.* 1*s.*, and those of the lands to 979*l.* 14*s.* (subject to the mother's jointure, which was stated at 240*l.* a year), and the timber was valued in the rental at 4000*l.*, and the whole was valued at 45,000*l.* It was also in evidence, that Mackreth sent down a man of the name of Hampton to view the estate, who was there a week, but what valuation he made, or whether the same was communicated to Mackreth, did not appear.

A trust deed was prepared by Garforth, reciting the mortgage, by which the estates were conveyed to Mackreth and Dawes (subject to Mackreth's mortgage and the annuity to Dawes), in trust to sell or mortgage the same, and to pay the debts and redeem the annuities granted by the plaintiff. These deeds being sent to Mr. Farrer, he made some objections thereto, on account of the sums advanced, as the prices of the annuities, not being scheduled as gross sums carrying interest at 5*l.* per cent., and also on account of the trustees being empowered to sell or mortgage the estates without the intervention of Mr. Fox. And it being afterwards agreed, that Mackreth should pay off Dawes, and advance some further sums, a deed poll was prepared, calculated for execution on the 16th January, 1778, and indorsed on the mortgage-deed, to secure such further sum of 7000*l.*, consisting of 5100*l.*, the consideration money for the annuities granted by the plaintiff to Dawes, with 212*l.* 10*s.* interest thereon, for the quarter's arrear due 23rd December, 1777 (but which was not paid by Mackreth to Dawes until the 16th July, 1788), and 51*l.* 14*s.* 9½*d.*, twenty-three days' arrear of the said annuities, from 23rd December to said 16th January, and 1635*l.* 15*s.* 2½*d.* paid to the plaintiff on the

16th January, 1778. A new trust-deed was also prepared, in which this deed poll was recited, and the 3000*l.* and 7000*l.* made the first charges on the estate.

On the 16th January, 1778, the plaintiff Fox and the defendant Mackreth dined together at the house of the defendant Garforth, for the purpose of executing these deeds, and after dinner, and before the plaintiff had executed the deeds, a conversation arose, in which it was proposed that the defendant Mackreth should become the purchaser of the estate, and Jackman's valuation of 45,000*l.* was mentioned by the plaintiff as a fair price, which was objected to by Mackreth, considering the value put thereby upon the houses and lands; upon which the defendant made a calculation of the houses at fourteen years' purchase, and the lands at thirty, together with the household furniture, valued at 500*l.*, and the timber at 4000*l.* (on which last two articles they agreed), amounting to 37,853*l.* 14*s.* The plaintiff afterwards offered to sell the estates to the defendant for 42,000*l.*, upon which the defendant said he would split the difference, and give 39,500*l.* for the same, but would not give more; and the plaintiff not agreeing to accept the terms, the trust-deeds were then executed by the plaintiff.

After the deeds were executed, the conversation was renewed, and the plaintiff expressing some concern with respect to his mother's jointure, in case he should accept the defendant's terms, the defendant offered the 39,500*l.*, and to subject himself to the payment of the plaintiff's mother's jointure, in case she should survive him; upon which the parties agreed, and the defendant Garforth (who had been absent during the greatest part of the treaty) was called in, and drew up a memorandum of such agreement, by which the money was to be paid on or before the 25th of March next, till which time the plaintiff was to receive the rents and profits, and then convey the estate to the defendant Mackreth; and about twelve o'clock at night this memorandum was signed by the plaintiff, upon which the trust-deed was cancelled.

On the 28th of the same month, articles for the pur-

chase were executed by both parties. On the 24th April following, the plaintiff, and Anna Fox his mother, on the 2nd of May, executed conveyances of the estates to the defendant, in consideration of 39,500*l.*, 11,097*l.* of which was retained by the defendant, in payment of the above mortgage of 3000*l.*, the 7000*l.* secured by the deed-poll, and some other sums charged by the defendant, as advanced to the plaintiff; and the defendant gave the plaintiff, as a security for the residue (being 28,403*l.*), a common accountable receipt; and afterwards, on the objection of the plaintiff to this as the only security for the money, the defendant wrote, on the same piece of paper which contained the accountable receipt, the following charge:—"25th April, 1778. I do hereby charge all my estates in the county of Surrey with the payment of the above sum of 28,403*l.* and interest." At the time of signing the above, the defendant had no estates in the county of Surrey but those purchased by him of the plaintiff; and the defendant gave to the plaintiff no other security for the residue of the money than the receipt and charge.

In the interval between the execution of the articles and that of the conveyances, Mackreth had treated with Thos. Page, Esq., for the sale of the whole of the said estate; and on the 21st March, Mr. Page agreed to give 50,500*l.* for the same, but no article was entered into between him and the defendant till the 30th of April following. Immediately after, Page was let into possession, and was to receive the rents and profits from Lady-day then last. The treaty with Page was totally unknown to the plaintiff, when he executed the conveyance to the defendant.

The plaintiff drew upon the defendant for several sums on account of the purchase-money; and in October, 1778, having sent for an account, the defendant drew one out, by which he made a balance remaining in his hands of 773*l.* 18*s.* 9*d.*; but admitted in his answer that he had therein charged monies unpaid, as the supposed amount of two annuities and the arrears thereof then unredeemed; and afterwards, in May, 1779, having then settled the

said annuities, he sent the plaintiff another account, in which he made the balance 616*l.* 17*s.* above the other balance of 773*l.* 18*s.* 9*d.* In June, 1779, the plaintiff, being again in distress, applied to the defendant, when he advanced him 2100*l.* upon an annuity of 350*l.* a year for plaintiff's life, secured by a bond in the penal sum of 4200*l.*, and warrant of attorney to enter up judgment on the same.

Upon discovery of the sale to Page, under the circumstances as stated above, the plaintiff filed his bill (*a*), insisting that the defendant Mackreth, being a trustee for him under the trust-deed for payment of debts, it was his duty to sell the same for the advantage of the plaintiff: and if he purchased for himself (which the plaintiff was advised he could not) it should be for a fair and adequate consideration; that the plaintiff, having been imposed upon, ought to have the benefit of the sale; and that the sum of 7000*l.*, mentioned in the articles as due to Mackreth, on mortgage, or the part thereof estimated to be due to the defendant as the value of the annuities granted to Dawes, was a much greater sum than they were really worth on a fair valuation; that no greater allowance ought to be made out of the purchase-money than the sums really advanced, with interest from the time of advancing the same; that Mackreth had not discharged the annuities granted by the plaintiff, but the plaintiff continued liable to the same; and that at the time he granted the last annuity of 350*l.*, there was money in the defendant's hands, or the defendant was accountable to the plaintiff for larger sums, as he then had in his hands the sums for which he sold the plaintiff's estate, beyond the sum of 39,500*l.*, and therefore prayed as is before stated.

(*a*) In 1781

The defendant Mackreth, by his answer, insisted on the airness of the transaction, and that the price at which he bought the estate was an adequate price, though he expected to have some benefit by selling it out in parcels; but that the purchaser, Mr. Page, having an estate in the neighbourhood, gave a larger price than it was worth to other persons. He admitted that he had in his hands a

balance of 617*l.* 13*s.* of the purchase-money, which he claimed to retain, on account of the plaintiff being only tenant for life in a small part of the estate conveyed to the defendant, and 773*l.* 18*s.* 9*d.* the balance of the accounts sent to the plaintiff in October, 1778; and the defendant Mackreth further said, that on the 30th of August, 1779, part of the estate being discovered to be copyhold, the defendant applied to the plaintiff to execute a letter of attorney, to surrender such copyhold premises to the defendant, which he readily agreed to, and signed such letter of attorney; and that Mr. Page, the purchaser, in November, 1779, having raised a sum of money by mortgage of part of the said estates, and afterwards having occasion to raise money by mortgage of other parts of the said estates, and the solicitor for the person advancing the money requiring to have the original deeds of the 22nd and 23rd December, 1777, and the conveyance from the plaintiff to the defendant or duplicates thereof, the defendant applied to the plaintiff to execute other parts of the deeds, which he agreed to, and, together with his mother, executed the same without expressing himself dissatisfied with the purchase made by the defendant (but it was in evidence that Mr. Farrer only consented to the plaintiff's executing the same under a proviso that the same should not be considered as a confirmation), which acts of the plaintiff the defendant insisted would operate as confirmations of the transactions.

The cause was heard at the Rolls, before his Honor Sir *Lloyd Kenyon*, the then Master of the Rolls, on the 26th, 27th, and 29th of June, and on the [4th], 13th, 14th, and 26th of July, 1786, on which last day his Honor was pleased to make his decree, whereby he declared that undue advantage was taken by the defendant Mackreth of the confidence reposed in him by the plaintiff Fox, and that therefore the defendant Mackreth ought to be considered as a trustee as to all the estates and interests comprised in the conveyance of the 23rd and 24th days of April, 1778, for the said plaintiff Fox, after the execution of the said deeds; and ordered it to be referred to the

Master to take an account of the money received by the defendant Mackreth from Page, and to compute interest thereon, at 5*l.* per cent., from the time of receiving the same, and to take an account of the money paid by defendant Mackreth to Dawes on account of the annuities of 500*l.* and 300*l.*; and also an account of the money advanced by Mackreth on account of the annuity of 350*l.* in 1779 (*a*): and an account of money received by Mackreth on account of the mortgage in 1778, and under the contract for the purchase of the estate (*b*), and compute interest on the same; and that the defendant Mackreth should pay the plaintiff the costs of the suit in respect of his insisting on the conveyance of the 23rd and 24th of April, 1778, as a conveyance for his own benefit: and granted an injunction against the defendant Mackreth, to restrain him from proceeding at law touching any matter in question in the cause (*c*); and reserved further consideration.

From this decree there was an appeal, by the defendant Mackreth only, to the Lord Chancellor, which came on to be heard in Michaelmas term, 1787.

Mr. *Mansfield*, Mr. *Scott*, Mr. *Lloyd*, and Mr. *Mitford* were heard for the respondent in support of his Honor's decree. His Honor declared, as the foundation of his decree, that an undue advantage had been taken of the confidence placed in Mackreth by Fox, and upon that ground directed the proper accounts to be taken. In that decree, Dawes and Garforth have acquiesced. Mackreth, the principal defendant, only disputes the justice of it; nor is it to be wondered at that he does so, for, whilst the decree stands in force, his character stands materially affected. The parties on the other side are anxious to maintain the decree, not merely on account of the largeness of the property, but as a useful precedent. (The counsel enumerated the facts of the case, as before stated.) Upon the facts as stated, His Honor thought Mackreth had abused the confidence reposed in him by Fox, and ought, with respect to the purchase, to be considered as a trustee for him, and that Fox ought to have the advantage of the transaction with Page. The circumstances are

(*a*) "And the particular times when, and in what manner, such sums were advanced." Reg. Lib.

(*b*) "Or the conveyance thereof, and to state the particular times when, and to whom such sums were paid, and the account in which the same were included respectively." Reg. Lib.

(*c*) This injunction was dissolved by Lord *Thurlow*; but, as he afterwards confessed, by mistake, see *Ex parte Lacey*, 6 Ves. 627.

certainly such as to shew an implicit confidence placed by Fox in Mackreth and Garforth, who appears to have been attorney for Mackreth. Wherever the transaction would bear the light, the deeds were sent to Farrer, the plaintiff's trustee; where it would not, it was kept a profound secret from him, although Mackreth had promised that nothing should be done without the latter being consulted. That Garforth was the agent of Mackreth, not of Fox, is apparent: he was privy to the whole transaction with Page. If he was the agent of Fox, he should have given him notice of that transaction; if he was not, the utmost confidence is given to Mackreth: Fox takes his word in everything; he gives up to his opinion Jackman's valuation and his own judgment; and at twelve o'clock at night sells him the estates at his own price, which was 10,000*l.* below Jackman's valuation. So with respect to the furniture: it is sold at Mackreth's valuation, though it included five hundred pounds' worth added by Fox himself to the furniture left by Lord Bingley. Mackreth through the transaction affected to be the friend of Fox, and, by his conversation with Farrer, admitted himself to be a trustee for Fox; for that conversation cannot be explained by Mackreth's being to have the purchase-money to pay debts, as that agreement did not subsist at the time, the agreement at that time only being that the purchase-money should pay the debts charged on the estate. Enough has been stated to shew that Fox was in the situation to be the object of fraud, that a trust was reposed in Mackreth, and that fraud has been practised upon him; and, therefore, sufficient to maintain the declaration in the decree. But it has been, and will be again, endeavoured to protect Mackreth, by arguing that the case does not fall under any of the heads of fraud. To this it has been answered by his Honor, that it was such a transaction as could not be maintained, but that it did fall within the cases of young men, having estates in possession and in reversion, and dealing with a man of business, and of advantage taken of their distress, except that this case had the pre-eminence, as being the case where

confidence had been so much abused. It was also argued, that inadequacy of price was not a ground for setting aside the bargain, though it has been frequently decided, that, where the inadequacy is very great, that has been a ground for rescinding the transaction: *Chesterfield* v. *Janssen*, 1 Atk. 301; 2 Ves. 125. The real value of the estate here was 50,500*l.*, and it is sold for 39,500*l.*: the inadequacy, therefore, proves the abuse of confidence; and, though it is undoubtedly true that every contract improperly made shall not be rescinded, yet a contract grossly inadequate and founded in breach of confidence, will surely be set aside; though the Court cannot affect the strict rule of morality, and can only enforce what Mr. *Madocks* called a technical morality, yet, in the case of a trustee or a person standing in a situation of which he can avail himself, the Court will not suffer him to derive advantage from that circumstance. Here every art was used to impress Fox with the idea that Mackreth and Garforth were his friends, though the transactions with respect to the annuities shew them very much otherwise. Mackreth certainly derived an advantage from his situation: Fox never was out of his debt. To deal with him at all was a fraud on the part of Mackreth: *Osmond* v. *Fitzroy*, 3 P. Wms. 129. There was nothing like the confidence, or the abuse of the confidence, in *Gwynne* v. *Heaton*, 1 Bro. C. C. 1, that there is in the present case; yet there the transaction was set aside. Here the confidence reposed in Mackreth is made use of to induce a confidence in Garforth. The same person being employed on both sides, has been considered, in the case of *Sir P. Jennings Clerke* v. *Smith*, at the Rolls lately, as a sufficient badge of fraud to set aside a transaction. There, Sir Philip had bought an annuity of Smith; the same person was concerned as attorney on both sides, and had not taken proper care of the security: his Honor thought that a sufficient ground on which to direct an inquiry. Then, with respect to the confirmations, none of the facts come within the cases which have been held to be confirmations; in order to be such, they must amount to a release of action. The reason given in *Chesterfield* v. *Janssen* for holding it a con-

firmation was, that Spencer knew all the transaction, and that he was entitled to set it aside. In the present case the suffering the duplicates to be made of the deed is a mark of confidence, but by no means amounts to confirmation, as it was done without any knowledge in Fox that he could impeach the transaction. *Baugh* v. *Price*, 1 Wils. Exch. 320, was a case where all the acts were repeated, yet held no confirmation: *Taylor* v. *Rochford*, 2 Bro. P. C. 281. No act can be a confirmation of a preceding contract but what is done with full knowledge of that contract: *Cole* v. *Gibson*, 1 Ves. 503.

Mr. *Ambler*, Mr. *Madocks*, Mr. *Selwyn* (*a*), Mr. *Ainge*, and Mr. *Hargrave*, for the defendant and appellant, Mackreth.—The Master of the Rolls has decreed 11,000*l.* to be paid by Mackreth to Fox. We shall submit to the Court, that his Honor has gone, in making the decree, further than, from any of the cases, or from the reason of the thing, he ought to have done. It will be necessary, in order to shew this, to state the progress of the cause. The first bill was filed in the name of Fox, in June, 1781, three years after the purchase by Mackreth; another bill was filed in February, 1782. In March, a motion was made for an injunction to restrain Mackreth from proceeding on the annuity bond. Mackreth's answer was read against that application; and your Lordship was of opinion, that there should be no injunction, there being

(*a*) Mr. *Selwyn* read, as part of his speech, a note of what the Lord Chancellor (*Thurlow*) said on discharging the order for the injunction, to the following purpose (*b*):—*Lord Chancellor.*—It is impossible to observe, that one-fifth more has been paid for the estate, and not to wish that the first owner should have the advantage. I have tried, on the head of every one observation, whether I could decree that Mackreth should be a trustee for Fox, for the difference of value in the estate. I attended, with great care, to see whether I could find any surprise on Mr. Fox, but the whole case begins and ends with the circumstance of an advantage being made in point of price. If Mackreth had sold the estate to A., (being a trustee for Mackreth,) the case could not have stood; but Mackreth lost the character of a trustee when he became a purchaser of the estate. The rental was extended into particulars, for the purpose of calculating the true value of the estate. It is not argued that the rental was unfair. Jackman's calculation was pressed by Fox upon Mackreth; deliberation was had, and the difference split between them. A slight memorandum was made by Mr. Garforth, who acted as agent for Fox; and his memorandum was laid before Mr. Burton, at the bar. It is not on the 28th of January that the agreement is signed by Fox; but it is a deliberate act by Fox at the distance of twenty-two days. The whole impeachment of the transaction, which is now opened, is upon the difference of price (*c*). It does not appear to me, that, at the time of the purchase, a greater price could have been produced in the common course of business of sale of estates.

(*b*) This injunction was dissolved upon a clear mistake: *Ex parte Laccy*, 6 Ves. 627; vide note, post.

(*c*) The price given for the estate, according to the principle upon which the case was ultimately decided, was immaterial.

no surprise upon Fox, nor any fraud imputable to Mackreth. Then, for the purpose of introducing creditors into the cause, in May, 1782, an assignment is made by Fox of his estate to four trustees, Mr. Pitt, Mr. Hoare, Mr. Oliver, and Mr. James Farrer, in trust, to pay debts. In 1784, Mr. O. Farrer releases himself, and in June in the same year a bill is filed by the three trustees, to have the benefit of the suit begun by Fox: this artifice was used in order to have the advantage of the plaintiffs appearing as creditors. The cause came on to be heard in the same manner as if brought by Fox. The decree is wrong, both in the declaration and in the direction. We contend, first, that there was no confidence reposed by Fox in Mackreth; secondly, whether there was a confidence reposed or not, there was no abuse of it; thirdly, that neither the declaration, facts, nor circumstances support the directions. With respect to the first head, there is no circumstance by which a confidence can be shewn to have been reposed in Mackreth. He was only a trustee as to the 28,403*l.* balance, to apply it in the payment of debts, for which sum he has accounted; certainly every trust implies a confidence; but not such a confidence as is meant in the decree, as a trust to be abused. If the trustee does not perform his trust, it is a breach of trust, not an undue advantage of his situation. Where a person treats with another without the power of inquiring into the value, and makes an improper bargain, that is taking an undue advantage; but that is not the case of a trust. The declaration is, that Mackreth has taken an undue advantage of his situation; and, therefore, is to be considered as a trustee for the plaintiff: this could refer only to the purchase, not to the loan or the annuity, and these cannot be said to be transactions of confidence: farther, can the purchase be so considered? Two persons are dealing for an estate. Mr. Fox wants an extravagant price; Mr. Mackreth wants to purchase at a reasonable one: both argued as to the value. Fox had a valuation as well as Mackreth, and a fair price was given. If so, the declaration cannot be right. Secondly, the bill is filed to attack

every transaction between the parties, and to make the whole appear as one system of fraud, yet if they can succeed in the point of the purchase, it is all they want; the other circumstances are thrown in to give weight to the main point, that Mackreth shall account for 11,000*l.* received from Page: that is, for 5500*l.* more than Jackman's valuation. The true question is, whether Mackreth is a fair purchaser of the estate at 39,500*l.*? There is no pretence that he ever refused to let the annuities be redeemed—two of them, in fact, were redeemed; nor is there any ground to quarrel with the loan. Mackreth had no dealings with Mr. Fox during his minority; he did not even know him at that time. The first application to Mackreth was from Garforth, to buy an annuity. Garforth was connected with Fox for the purpose of borrowing money. If none of the articles themselves are sufficient to impeach Mackreth, being taken together they will not do so. As to the annuities, Fox sought Mackreth. In December, 1777, he granted him two annuities, amounting to 800*l.* a year; part of the 500*l.* a year annuity was the property of Mackreth, but the annuity was taken in the name of Dawes, and was at six years' purchase. Fox had been of age a month before Mackreth knew of his intention to suffer a recovery in the ensuing Michaelmas Term. It is said, Mackreth knowing this, should not have entered into this contract; but there is no reason why he should not. Fox had at that time only a life estate, and could make no security but a grant of an annuity. Six years' purchase was then allowed of as the common price.

(*a*) Amb. 18. In a case of *Floyer* v. *Sherrard* (*a*), before Lord *Hardwicke*, Hil., 1740, Floyer had bought of Sherrard an annuity at six years' purchase, secured upon money in the funds, in the names of trustees. He filed his bill against the trustees to pay the annuity: the objection was, that Sherrard was a man in distress, and that only six years' purchase was given for the annuity. Lord *Hardwicke* said, this case differed from that of young heirs, because Sir B. Sherrard, the father, was in possession of the estate. A sale of an annuity, not redeemable, was not an usurious transaction:

where they are made redeemable, the Court has thought it an evasion of the law. As to the price of an annuity, it is the most uncertain thing in the world; taking it upon the highest calculation, it is only one year's purchase under the value; and the Court will not set it aside on that account. Then as to the security; if he had taken it on the estate, it would have been good. It was done on bond and judgment, without insurance of the life. Every hardship which occurs in this case is such as must occur in every case of the kind. Then this annuity was not redeemable. Lord *Hardwicke's* opinion on this subject appears to have been, that a redeemable annuity is usurious (*a*).

(*a*) See *Floyer* v. *Sherrard*, Amb. 19.

[*Lord Chancellor.*—I do not believe that has ever been decided. It is certainly a ground to suspect a shift; but there is no decided case, that the annuity being redeemable will make the transaction usurious (*b*).]

(*b*) It is now fully established that such a transaction is legal. See *Irnham* v. *Child*, 1 Bro. C. C. 92; *Lord Portmore* v. *Morris*, 2 Bro. C. C. 219, Amb. 244, note (3), Blunt's edit.

With respect to consulting Farrer, that was not Mackreth's business, if Fox did not choose so to do. If it was anybody's business to advise Fox, it was rather Farrer's than Mackreth's. The next transaction is, the recovery suffered in Michaelmas, 1777; the legal estate was by it vested in Farrer, to protect it against the annuitants and creditors. He was mistaken with respect to this matter, for a judgment creditor could have taken out execution against the estate of the cestui que trust, the same as if it was a legal estate. As to the application for the loan of, first 2000*l.*, then 3000*l.*, what ground is there to quarrel with that? In that transaction Farrer was consulted; he was present at the execution of the mortgage deed, and proves the payment of the money. Two objections are made to it: first, that Mackreth took the legal estate out of Farrer; but Farrer thought it right that Mackreth should have the legal estate. Secondly, the other objection is, that it was part of the system, and having the legal estate would assist them in carrying it into execution; but, if it was wrong, Farrer ought not to have parted with the legal estate: no objection was made to Mackreth's being mortgagee in fee. Again, it is objected

that Mackreth did not then turn the annuity into a debt; but Fox wanted the 3000*l.* immediately, and it might not occur to Mackreth to turn the annuity into a debt. The next matter is, the transaction with respect to the trust. Mackreth did not propose himself; this was proved by Farrer, who says it was proposed either by himself or Fox. Mackreth says, in his answer, that he did not propose himself; Farrer declined being a trustee; and then Mackreth proposed Dawes, as being acquainted with annuity business. Farrer approved of Dawes, and Garforth took his instructions from Farrer. A copy of the particulars was delivered to Mackreth. On the 6th of January, 1778, the draft of the conveyance was sent to Farrer, who returned it on the 7th, with this observation: that it was not as he expected; for the annuities were carried down to the time of the sale, whereas they were to be turned into loans; and that Mackreth and Dawes were to have the whole authority to sell without any consent of Fox. There had only been a conversation, in which it had been proposed to turn the annuities into a loan. Then as to the sale itself. On the 16th of January, Fox and Mackreth treat on the subject. Mackreth offered 37,000*l.*, at last 39,500*l.*, including the furniture, and securing Mrs. Fox (the mother's) jointure. This agreement was put into writing by Garforth: no objection is made to the form of the writing. On the 28th of January, the contract was signed by Fox and Mackreth. The conveyance was laid before Farrer, and executed on the 24th of April; so that it was incomplete from January to April. The objection now taken and relied upon is, that Mackreth was a trustee, and, therefore, could not contract for the purchase of the estate: but we deny that he was a trustee; and, even though he were so, he might purchase upon fair terms. They contend, on the other side, that the trust deed was executed, and Mackreth bound not to contract with his cestui que trust. It is true, it was executed by Fox; for during the conversation about the purchase, Fox, not agreeing to sell at the price then offered by Mackreth, executed the trust deed, but

continued the conversation relative to the purchase, the trust deed lying all the while upon the table. If the conversation had ceased, the deed would have had effect; as it was, it was a nullity. Then how can it operate as a trust? It was a trust intended, if they will—commenced, but at the same moment put an end to—never acted under, but broke off immediately. But, even supposing him to be a trustee, he might contract for the estate, so that he did but deal fairly. We admit that a trustee cannot purchase for his own benefit. If, as a trustee, he had conveyed to a third person as a trustee for himself, that would be void; but there is no case which has decided that the cestui que trust cannot sell to his trustee. On the contrary, it was done in the case of *Clarke* v. *Swaile* (*a*), before Lord *Northington*, where Sir Samuel Clarke, by the advice of Swaile, conveyed the estate in question to him to sell for payment of debts. Swaile endeavoured to sell the estate, but could not meet with a purchaser. Swaile afterwards treated for and purchased the estate, which was conveyed to him at a fair price, and the money was applied in payment of Sir Samuel Clarke's debts. Another deed was afterwards executed on account of a variance in the description of the estate, and a third, occasioned by a variance of the boundaries. This last was executed by Sir Samuel Clarke and Robert, his brother. Sir Samuel died, and Robert (now Sir Robert) filed his bill, on the ground of a confidence being placed by Sir Samuel in Swaile as his attorney, and that his circumstances were such that he durst not quarrel with him. Lord *Northington* said, as to the cestui que trust dealing with the trustee, he did not much like it; but, upon the whole, he did not see any principle on which he could set the transaction aside. In the present case there is no species of fraud; it is not even attempted to be stated in the bill; but they argue, that, from the case itself, there is an implied fraud; the parties met for very different purpose; there is no colour to say it was to draw Fox into a sale at an under-value. In *Floyer* v. *Sherrard*, Lord *Hardwicke* relied on there being no proposal coming

(*a*) 2 Eden, 134. See also *Coles* v. *Trecothick*, 9 Ves. 234; *Morse* v. *Royal*, 12 Ves. 355.

from Floyer. Then as to the argument, that Fox was in distress: he was upon the eve of extricating himself from any distress he might have been in; he was of age; and there is nothing to prove any weakness of mind, or incapacity of any kind. He was perfectly competent to act. He asked 45,000*l.*, and for that purpose produced Jackman's valuation. Mackreth objected, that it was thirty-five years' purchase for houses and land, which was a monstrous price, and offered fourteen years' purchase for the cottages and thirty for the land, amounting to 37,000*l.* He afterwards advanced to 39,500*l.* Fox then insisted on 42,000*l.* Fox had a particular. It is said Mackreth had a valuation; but not a word of that is in proof. Farrer not being present at the final agreement, is the next head of objection. But if Mr. Fox did not choose to have him present, it could not be incumbent on Mackreth to send for him: besides, the draft of the conveyance was sent to him; and if the price was not adequate to the value, or there was anything wrong in the contract, Farrer should have objected to it, and have advised Fox not to proceed; on the contrary, it appears by his letter of the 7th of April, 1778, that he approved of the conveyance, except that he objected, in some respects, to the mode, and to the money remaining in the hands of Mackreth for payment of Fox's debts; but to the purchase itself Farrer never objected. With respect to the money remaining in Mackreth's hands, that does not go to the merits of the case, though the gentlemen on the other side have treated it as a badge of fraud. Mackreth accounted for the application of every shilling of the money, with interest for the time it remained in his hands. We have no objection to an account being decreed with respect to the application of the money. Then with respect to the confirmations, they are very strong. We do not dispute the principle, that whilst the distress continues subsequent acts shall not be held to be confirmations. It appearing upon the sale to Page, that part of the estate which had been sold as freehold really was copyhold, Fox, on the 19th of August, 1779, executed a warrant of

attorney to surrender the same. This was not clandestinely, but openly applied for; it was a conveyance of part of the estate which was not conveyed before. He afterwards executed duplicates of the deeds. The purchasers from Page in parcels wishing to have original deeds, Farrer made no objection, if they would indorse upon the deeds that they were duplicates.

[*Lord Chancellor.*—He expressly stipulated that the execution of these deeds should not be a confirmation.]

The real cause of the suit is, that Mr. Page has given 50,500*l.* for the estate. Mr. Fox rested under the sale till 1781, when that sale was discovered; but an advanced price being afterwards obtained is no reason for setting aside a previous fair sale of lands. To assert that it is, would be too much, where there is no fraud. The price of 50,500*l.* paid by Page was, in fact, a pretium affectionis; it was 5500*l.* more than Jackman had valued it at, or Fox ever thought of getting for it. Having shewn, then, that Mackreth was no trustee, and that the separate acts are fair, there can be no fraud in them taken collectively; yet the argument, juncta juvant, is relied on in this case. There is only one case in which that argument has prevailed; indeed, it is only fit to have a popular effect, not to be used in a court of justice. It only applies to a case made use of in circumstances which all terminate in one point, and which cannot be accounted for any other way. It is said, the circumstances in this case are all linked in one chain—that they all tended to the making an unreasonable purchase; but the other side have not been able to connect them. The treaty for the annuities and the purchase are separate and unconnected; therefore it is to be hoped that the arguments used, viz., that although the separate articles were not sufficient to set aside the transaction, yet that altogether they are sufficient, will meet the same fate here that it did in Parliament in the case alluded to (*a*), and that this Court will reverse the attainder and restore Mr. Mackreth in blood.

(*a*) The case alluded to is that of *Lord Strafford.*

Mr. *Mansfield* in reply.—It is not to be denied that the large price at which the estate has been sold to Mr.

Page is the cause of the present suit. It is that advance of price which affords the strongest evidence of the purchase by Mackreth being fraudulent. Mackreth and Garforth are to many intents one and the same. The decree against Mackreth is, that he shall deliver up all papers which are in his hands. The present case contains fewer contested facts than generally occur in similar matters; and the remedy which lies with the Court is a very evident one. It has been argued that the Court cannot enforce an absolute, but only a technical morality. I know of no such term as "technical morality," that has ever been applied in this or any other case; but where one person has obtained an unfair advantage over another, the province of a Court of equity is to give the latter redress. Lord *Coke*, in his First Institute, has very shortly defined the office of this Court to extend to cases of "covin, accident, and all deceit for which there is no remedy in a court of law." What, then, is the true question in the present case? The Master of the Rolls has founded his decree in a confidence reposed by Fox in Mackreth. The question is only as to the inference to be drawn from the facts. In order to make out the confidence reposed by Fox in Mackreth, a few circumstances are to be attended to. Mr. Fox came of age in August, 1777. Very soon after that (in September, 1777) the connexion between him and Mackreth began. The first step was the purchase of two annuities, at six years' purchase; then the loan of 3000*l.* on mortgage of the Surrey estate; then Mackreth engages to become a trustee to sell the estate for payment of debts, apparently with no other intention than to relieve Fox's necessities. On the 16th of January they met to execute the trust deed; but the meeting terminated in the agreement for the sale of the estate. On the 24th of April there is a conveyance of the estate, and Fox has nothing to show for the balance of 28,403*l.* but Mackreth's accountable receipt and charge of the money on the Surrey estate. On the 21st of March Mackreth had sold the estate to Page for 50,500*l.* Towards the close of 1778 he had lent Fox 1000*l.*; in June, 1779,

there was a treaty for an annuity, part of the consideration for which was to be the 1000*l*. The account made up in 1778 is agreed on all hands to be a false one. In June, 1779, another account was made up. Then Mackreth applied for duplicates of the conveyances, which Fox complied with. These are the material facts, from which it is impossible to doubt that the fullest confidence was reposed by Fox in Mackreth, and that Mackreth did, on the 16th of January, take an undue advantage of that confidence. Every transaction of that day shows that Mackreth represented himself as Fox's friend. The account given by Mackreth, in his answer, relative to the loan of 3000*l*. and the annuity, is contradicted by the evidence. A full confidence is not to be expected to an answer in general, which is proved false in any particular. Suppose it to be true that the proposal for the sale came on the 16th of January from Fox, how easy was it for Mackreth to suggest that an immediate sale would be better than entering into a trust deed, and to make the formal proposal come from Fox, though the suggestion was his own? But be this as it may, no just inference is to be drawn from it to the merits of the cause. Fox entered into the contract with Jackman's valuation in his hand, and at twelve o'clock at night drops his price to 39,000*l*. How is this to be accounted for but by his confidence in Mackreth? If the sale had been fair and open, I should be precluded from these observations; but there never was a contract which was more suspicious, from the characters of the parties concerned. The counsel on the other side have said, that, when they were treating for the sale, the confidence was over, and that they were in a market; but it is impossible a sale could be negotiated under circumstances more private. It is as near the case of a trustee selling to himself as can possibly be; but still it shows what opinion Fox had of Mackreth. It is highly probable that the latter had the sale in his contemplation when he made the appointment. This is rendered probable by his having a valuation. This observation has received no answer, except that it

was natural, that, in order to sell as a trustee, he should have a valuation; but no notice was given to Fox of that valuation by Hampton. Fox and his agents were kept in the dark as to that survey. Mr. Fox came to Garforth's to meet Mackreth as a friend, where Mackreth, having in his possession a valuation, and concealing that fact, induced Fox to sell for 5500*l.* less than the only valuation he had. If there was nothing more in the case, Mackreth ought not to retain the great advantage he has made. As a friend, Mackreth should have let Fox know he had sold the estate to him for 11,000*l.* less than he (Mackreth) had contracted to sell it for to Page. Then Fox parts with the estate on a bare accountable receipt and a charge upon the estate. The money is not deposited in the hands of any banker, and the estate is conveyed to Page without any notice of the charge, which made an end of the charge. This plainly shows that Fox trusted entirely to Mackreth. The settlement of the account is another mark of the most implicit confidence, and the whole transaction as to the loan and the annuity proves the same; but the gentlemen on the other side say, that the accumulation of the facts is immaterial, and that the application of juncta juvant ought to have no weight. If it was proved that the transaction of the 16th of January was perfectly fair, I allow their argument would apply; but whilst the great question of evidence is with respect to the fairness of the transaction of the 16th of January, it is material to shew the complexion of the whole transaction taken together, and especially the power Mackreth had over Fox. This has the more weight, because it is incumbent on Mackreth to prove that the transaction of the 16th of January was fair and honest. To whom is it to be imputed but to him, that there was no witness of the transaction? He ought not to have entered into such a treaty with a young man, without having a witness present. The whole transaction speaks the truth of the Master of the Rolls' declaration, that there was a confidence reposed in Mackreth; and it will need very little argument to prove that that confidence

was abused. Either Mackreth had a valuation at the time of the treaty, or not. If he had not, he induced Fox to sell at 5500*l.* less than his own valuation; if he had, he concealed that circumstance from Fox, and now conceals it from the Court. Another thing that is urged is, that Fox has confirmed the transaction. If he has confirmed it, I admit it cannot be rescinded; but the first preliminary to a confirmation is, that the party should be previously apprised what it is he confirms. When the present comes to be compared with the confirmations in the cases where they have been held to bind, it is very unlike them; for none of them, except the execution of the duplicates of the conveyances, have the least tendency to confirm. They are mere consequential acts. In *Chesterfield* v. *Janssen* and *Cole* v. *Gibson* there were clear acts of confirmation. Here they are only carrying the contracts into execution; and the execution of the duplicates only shows how much Fox was in the power of Mackreth. It was only done for the purpose of getting something which might be called an act of confirmation; and Farrer refused to consent to their execution but with the proviso that it should not be considered as a confirmation. If Mackreth had first informed Fox of the real value of the estate, and then he had affirmed the contract, it would have been final. On the contrary, he was in distress in 1779, and absolutely in the hands and power of Mackreth; and so he was at every period when the confirmations were obtained. No one act was done with a knowledge of the value of the estate. By his own admission, Mackreth cheated Fox out of 600*l.* or 700*l.* in his first account. In May, 1781, he sent him another account rectifying the mistake. In the meanwhile he had lent his money on bond, and bought an annuity of him. If not from friendship, from what principle did Mackreth act, but from the desire to get this estate, or as much as he could out of Fox? It is urged, that this transaction cannot be set aside, because, if it is, no man can purchase at a fair price, and sell at a greater without the fear of having the transaction rescinded. But was there ever a fair

case where such an advantage was taken as in the present? No man, acting fairly, would deal with a young man without witnesses; no man, acting fairly, would conceal his having a valuation. It is to be hoped such a transaction will never exist again; but no fear can arise to fair transactions from such a transaction as this being overturned.

2 Cox, 320. Lord Chancellor Thurlow.—The great and only doubt which I have had from the beginning to the end of this case is, whether the ground upon which I must go, if I affirm this decree, will not by necessary implication extend to many other cases, in which I shall run the hazard of undoing all the common transactions of mankind, and of rendering all their dealings too insecure. I do not agree with those who say, that, wherever such an advantage has been taken in the course of a contract by one party of another, as a man of delicacy would refuse to take, such a contract shall be set aside. Let us put this case: — Suppose A., knowing of a mine on the estate of B., and knowing at the same time that B. was ignorant of it, should treat and contract with B. for the purchase of that estate at only half its real value, can a Court of equity set aside this bargain? No; but why is it impossible? Not because the one party is not aware of the unreasonable advantage taken by the other of this knowledge, but *because there is no contract existing between them by which the one party is bound to disclose to the other the circumstances which have come within his knowledge;* for, if it were otherwise, such a principle must extend to every case in which the buyer of an estate happened to have a clearer discernment of its real value than the seller. It is, therefore, not only necessary that great advantage should be taken in such a contract, and that such an advantage should arise from a superiority of skill or information, *but it is also necessary to show some obligation binding the party to make such a disclosure.* Therefore the question is, not whether this transaction be such as a man of honour would disclaim and disdain, but it must fall within some settled definition of wrong recog-

nized by this Court; for, otherwise, the general transactions of mankind would be too much in hazard and uncertainty. In this view, and in this view only, I have entertained considerable doubts on this case.

The Master of the Rolls has referred a great variety of accounts, subsisting between the parties, to the Master; and it is not quite a fair argument to consider this part of the case as altogether decided. If these points are material, the only consequence is, that, as to them, the judgment must be suspended.

In the present appeal I shall consider the case entirely on the transaction of the 16th of January. I shall also consider certain terms necessary to be found, in analogy to the finding of a jury. First, it is necessary to find the real value to be what Page gave for the estate, or much more at least than the price given by Mackreth; for, unless there be great inadequacy of value, the case comes to nothing. The fraud or imposition of the one party affords no ground of relief, unless *damage* be sustained by the other (*a*); and, on the other hand, it does not follow, though the real value should be found such as now represented on the part of the plaintiff, that it will put an end to the contract, unless such advantage has been obtained by some of those frauds which the policy of this Court has adopted as grounds on which to set contracts aside.

(*a*) This opinion Lord *Thurlow* changed, for he refused an inquiry as to the value of the estate.

The Master of the Rolls has said that Mackreth shall be a trustee, and so he must be taken *consequentially*; for, if it be true that Mackreth has cheated Fox in this bargain, he did get the estate at law, but he did not get the estate in equity, and then he is reduced to a trustee. It is *only* in consequence of his getting the estate by fraud, that he becomes a trustee. Suppose an estate to be of the value of 50,000*l.*, and Mackreth buys it for 40,000*l.*, committing great fraud in such purchase, but, from the calamities of war and other public distresses, landed property as well as stocks sink in value more than one-fifth, and Mackreth then sells the estate for 35,000*l.* or 30,000*l.* only, would it not be true that Mackreth would

be bound to pay the 10,000*l.* as a satisfaction for the fraud committed by him, although he had not made the money he actually gave for it? The money would be due, not in consequence of what Mackreth afterwards sold it for, but what Fox lost by it at the time. The only consequence, in a Court of equity, is, that what one party lost by the undue advantage taken by the other must be answered to him.

The Master of the Rolls went on the fact of the value of the estate being that for which it was sold to Page, and thought, that, this being the value, Mackreth had cheated Fox. Taking this for the present to be *so*, let us go over shortly the facts of the case.

Fox began to be distressed about three or four years before he came of age. He engaged other young men, with whom he was connected, to become securities for him for sums of money he had borrowed. He had involved himself in annuities. When he came of age he found himself under this imperfect obligation in point of law, but very strong obligation in point of honour, to relieve those who had pledged their names for him. A plan was formed to sell a part of his estate. His situation as to fortune when he came of age was this: his estate in Surrey was about 1200*l.* per annum. Of this he was tenant in tail. He had an estate in Yorkshire of 1100*l.* per annum, of which he was tenant for life. He had also an estate in Ireland, of which he was tenant for life in possession, of about 5000*l.* or 6000*l.* per annum. Such was his situation when he came of age. He had resorted to a man of character in his profession, Mr Farrer, for the purpose of settling this business. The 23rd of August, 1777, came, and no step was taken towards taking any account of his debts and annuities, or negotiating with any of his creditors; yet it is most evident that the best time for settling these matters with his creditors was before he came of age.

However, he came of age on the 23rd of August; and on the 23rd of September, it seems, the first conversation was had upon this subject. He had then been introduced to Mackreth. At that time, certainly, there was nothing

confidential in their intercourse, or any close connexion between them; but Fox applied to Mackreth for about 5000*l.* Mackreth naturally asked what security he had to offer. Fox thereupon told him his real situation, by which it appeared that Fox had no permanent security to offer till Michaelmas Term, when he could suffer a recovery of the Surrey estate. Mackreth then proposed to him, as the ordinary mode of raising money, to buy an annuity of him at six years' purchase, which is, in truth, about half the real value; and, therefore, whoever proposes to deal with another upon this sort of terms, quits at once all idea of delicacy or generosity or propriety of conduct. It is such as cannot be endured out of a Court of justice; and, if a Court does affirm such transactions, it cannot be the heart of a judge which affirms it, but it must be done from a fear of laying down such rules as may tend to make the general transactions of mankind too insecure. There were other modes which might have occurred to a man of different feelings. A contract to make a mortgage when the Term came would have been an effective lien on the estate; and then it would only have been necessary to have insured Fox's life to the end of Michaelmas Term. This would have been the just and honourable way of relieving him. On the other hand, it is observable, that, though Mackreth adopted the other mode of raising the money, it was done in the usual course of his business; for, by profession, he dealt in the distresses of mankind. What he did, he did in his way and business of an annuity-monger. I make neither better nor worse of his conduct than that of a common and professed annuity-monger.

In November the recovery was suffered. Still nothing was done by Fox's friends towards relieving him from the annuities, which were eating him up. On the 24th of December Fox sends word that he was in great distress, in confinement, and wanted money immediately. Mackreth came to him and lent him money on common terms, and took a mortgage for it. A judge cannot impute anything to this part of the transaction, either one way or

another. There was no generosity on one side, nor any plot of circumvention on the other. It would be a most extravagant conjecture to suppose that by this Mackreth had in view to get the legal estate in himself. When one once gets beyond the natural result of facts, there is no end to conjecture or its consequences. This was the situation on the 24th.

Mackreth was made acquainted with the plan of the trust deed, and it is certain that he industriously recommended himself and Dawes as trustees for this purpose. It has been said, that Mackreth's forcing himself into the trust was improper, and done for some bad motive; and that taking the business out of the hands of Mr. Farrer was calculated to give Fox a bad impression of him. I do not agree to this. In whose room were Mackreth and Dawes to be substituted? The two first were Lord Grantley and Lord Ligonier, who were put in only because they were lords, I believe; for it was not very probable that they should be active or attentive in executing such a trust as this. As to Mr. Farrer himself, it is only to be said that he had, in fact, done nothing in the affairs, nor taken any step towards it. I therefore really believe that Mackreth meant what he said upon that occasion; and, when he proposed himself and Dawes as trustees, he meant to transact the business to the best advantage. In doing this he undertook a very delicate trust: first, he was to make the most of the estate; then to deal with the several annuitants. This put him into very awkward circumstances, himself and Dawes being both considerable annuitants; and, therefore, when he undertook to deal with annuitants at large, he undertook a very nice charge, and it was incumbent on him to see with very great attention that he did not show more favour to the annuitants than he ought to do.

I certainly do not approve of Mackreth's conduct, when, after having recommended himself as a trustee for these purposes, he allowed the several annuities to stand as far as they had then gone, redeeming them only from that time. However, in fact, he bought the annuities

on behalf of Fox, though with his own money; but, instead of considering them as discharged on the 24th of December, when he bought them, he considered them as bought for his own use, and treated them as existing annuities. Here, therefore, he has gone beyond the line of delicacy; for this is a transaction that a Court of equity will never permit to stand. Here the Court will say he took an undue advantage of his situation. Yet it seems as if he thought this a fair mode of dealing in this sort of market.

In another instance he charged Fox more than he actually gave for the redemption of an annuity; and this part of the transaction must of necessity be rescinded, as Mackreth has acted *unfairly* in it; and Fox has the advantage of finding that Mackreth, after having recommended himself as a trustee, and undertaken to act faithfully for his cestui que trust, has yet been dealing unfairly in this very article.

On the 16th of January it is allowed that Mackreth was a trustee of Fox, and whatever consequences arise from this character must belong to him. Considering him, therefore, as a trustee, see what he has done! First, he sent down a surveyor to the estate; but he has so managed this part of the case as to prevent the Court from seeing much into it. The Court will act temperately in its conjectures on this, but at the same time will impute all that it fairly can in point of suspicion. On one side it is said that Hampton was sent down to survey the estate with a view of enabling Mackreth to make the greatest advantage of it for his private benefit; but I do not think so. I think it ought to be taken that he had the estate surveyed as a *trustee*, in order that, in that character, he might know the real value of it, and thereby be better qualified to sell it to advantage. This, then, I consider as a part execution of his trust. But then Hampton's knowledge ought to be Fox's knowledge; and upon this arises a question which I think material—whether a trustee, gaining a knowledge of the subject in the execution of his trust and at the expense of the

cestui que trust (for I suppose the expenses incurred by the trustees must fall ultimately on Fox), and that knowledge consequently *belonging* to the cestui que trust, whether a trustee may not in *this respect* have the hand of justice laid upon him, if this knowledge is made use of by him to circumvent his cestui que trust, so as to afford a distinct ground of fraud in a Court of equity? I am rather at a loss to find what the evidence affords to this point. It appears, however, that Hampton stayed on the estate till the 17th of January.

In these circumstances Mackreth began to deal with Fox, remaining in his character of a trustee. Fox had a valuation of the estate made by Jackman, which, though not very full or particular, yet afforded the general terms for a treaty and agreement; and it went generally to show that the estate was capable of being improved about 100*l.* per annum. On this valuation, lying in medio, one party says the estate is worth 47,000*l.* Mackreth reasons on this survey, and says, first, that the houses are valued too high; secondly, that thirty-two years' purchase for the land is too much; next, that forty years' purchase for the lord's rent is out of all sight. Thus running down the valuation made by Jackman, he argued down Fox either from conviction or a sense of his distress, not indeed so low as 36,000*l.*, which Mackreth first proposed, but to a medium price of 39,500*l.*

The first question to be asked is, whether the character of a trustee shall vary the consequence of this transaction from what it would be in the case of a stranger? for it has not been argued, I think, that, in the case of a stranger, this bargain could be rescinded. Now, to what conclusion does the character of trustee go in this case? *If a trustee, though strictly honest, buys an estate himself and then sells it for more, yet, according to the rules of a Court of equity, from general policy and not from any peculiar imputation of fraud, a trustee shall not be permitted to sell to himself, but shall remain a trustee to all intents and purposes.* It is not therefore, in that view, that Mackreth, being called a trustee, can operate. It

does not rest on the name of a trustee, or on the legal or equitable relation of trustee, but on the familiar intercourse between him and Fox. Now, can I, putting myself in the place of a juryman, pronounce that Fox agreed to the price, *trusting that Mackreth knew the price and represented it fairly to him?* If A. says to B., I know the value of the subject, and if you will trust me, I will fairly tell you what it is worth, and A. at the same time knows the value to be double what he represents it to be, this is such an abuse of confidence as shall be relieved against, not because A. is a trustee, but because he stipulated with B. to tell him fairly the value, and he broke that stipulation; and then, to be sure, it makes full as strong a case as that of a trustee. But was this the express or tacit understanding of the parties here? I have no materials to affirm this fact upon; at least I am considerably in doubt how to find any evidence of this, where one party asserts one sum to be the value of the estate, and the other another, and both try to make the best of the bargain. At the same time there are such circumstances respecting the manner in which Mackreth undertook the trust, as make me hesitate. All this makes the question of the real value of the estate extremely material (*a*). I do not think it could have been sold at the time according to the rate of Jackman's valuation; and Mackreth's observations upon this seem to me to be well founded. No evidence has been adduced to show his valuation to be correct.

(*a*) Not for the purpose of the decision in a case between a trustee and his cestui que trust. See 8 Ves. 353; 9 Ves. 247.

Now, see what follows on the 16th of January. Garforth was called up and desired to put their agreement into writing. I do not see why it was necessary that this memorandum should be signed by both parties. I at first thought it showed an eagerness to get the bargain made; but it seems it was agreed that more regular articles should be executed afterwards. The execution of these articles carried the transaction one step farther in point of form. Still, however, the conveyance was not executed. It is asked, whether any man of honour would let Fox execute the deeds, after he had actually sold the estate for a much larger price? Many men, perhaps, would do it;

but I should never allow it to be the transaction of an honest man. Mackreth had forced himself into the confidence of Fox and was called upon, by every tie of honour and honesty, to consider himself as a trustee; but my doubt is, whether this is not too general a line to lay down in a Court of justice.

As to the manner of Mackreth's paying Fox the purchase-money, it has been much observed upon; but I do not see much in it. He had not the money by him, which may readily be supposed, but he gave an accountable note, with 5*l.* per cent. interest; and, to be sure, his note was just as good as a bond—very little danger of losing the money from a man of Mackreth's fortune; besides, it was a sort of lien on the estate. The manner in which the accounts are made up by Mackreth is objected to, and it is said that this shows a confidence reposed in Mackreth by Fox. So it does; but the question is, whether this confidence is ad idem—whether it shows a confidence on the part of Fox, *that Mackreth would tell him the true value of the estate?*

It is then said, that he was called upon to do several subsequent acts; but these are to be so naturally accounted for by other circumstances, that I do not see how fraud can be inferred from these. They are then spoken of as instances in which Fox has confirmed the original purchase. As to confirmation, it has been considered by the Court in very different ways. In *Lord Chesterfield* v. *Janssen*, the Court did not go on confirmation as it is usually understood, but on this, that Mr. Spencer, with his eyes open, and after the death of the Duchess, and when his situation was totally changed, thought proper to confirm the former bargain. So, the judges assistant relied on this principally, and did not give much opinion on the former part of the case. I wish they had gone further; for, as to the confirmation, he stood at that time under the former bonds. Another way in which confirmation operates is, by showing that the party then thinks himself to have been fairly dealt with. This occurs in the present case on the 28th of January. Again, on the 25th of April, Fox did not see he had had

any advantage taken of him. The use that I think is to be made of such confirmations is, as a proof that the party has seen no occasion to complain. In this view the present case is still stronger, for no complaint was made of this transaction till 1781; and, therefore, it is fair to infer that so notorious a disproportion of price as is now insisted upon was not within the suspicion of those who dealt for Mr. Fox; and it certainly would have been better if this suit had been brought earlier, for when are the affairs of mankind to be at rest? Nay, more than this, it is evident, and indeed not denied by the plaintiff's counsel, that the transaction never would have been impeached if Page had not given so large a price for the estate. This very much shakes my idea of the real value (*a*) of it. If this estate, situate near London, had really been sold at a great under-value, the friends of Mr. Fox must have known it by other means. Supposing the transaction with Page to be purely accidental and not springing out of the actual value, it never can affect this question. At the same time it is observable that Mackreth has produced no evidence of the value of the estate, to show that it is not worth more than what he gave Fox.

(*a*) The value, as before observed, was immaterial.

I have been desirous of stating my thoughts on this case, that the gentlemen concerned may be apprised of them, as it will very possibly be necessary to have this matter discussed further, even before me. I have conversed with the Master of the Rolls and the judges, with a wish to find some rule of evidence on which I can go in this case, without running the hazard of shaking too much the contracts of mankind. It is of very little consequence to the public to lay down *definite* rules of *law*, if you have *indefinite* rules of *evidence*. I shall therefore at present only direct an inquiry into the real value of this estate; and if upon that inquiry the value should turn out to bear a considerable disproportion to what Mackreth gave for it, I shall probably require some assistance in laying down such rules of decision as will set men at ease as to the disposition of their property.

His Lordship, however, did not direct any such inquiry,

but after a lapse of a considerable time affirmed the decree, saying only that he had considered the case very much, and that he could not see that his Honor's decree was wrong.

The defendant afterwards petitioned his Lordship for a rehearing of the appeal, but that petition was dismissed. See 2 Cox, 158. He then appealed to the House of Lords, assigning the reasons set forth in 2 Cox, 330; but, on the 14th of March, 1791, the appeal was dismissed with costs. Id. 339; 4 Bro. P. C. 258, Toml. ed.

The well-known and thoroughly discussed case of *Fox* v. *Mackreth* is usually referred to as having established the rule ever since recognised and acted on by Courts of equity, viz., that a purchase by a trustee for sale from his cestui que trust, although he may have given an adequate price, and gained no advantage, shall be set aside at the option of the cestui que trust, unless the connection between them most satisfactorily appears to have been dissolved, and unless all knowledge of the value of the property acquired by the trustee has been communicated to his cestui que trust. "It is founded," observes Lord *Eldon*, "upon this: that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence, in the power of the Court (by which I mean in the power of the parties), in ninety-nine cases out of a hundred, whether he has made advantage or not. Suppose a trustee buys any estate, and, by the knowledge acquired in that character, discovers a valuable coal-mine under it, and, locking that up in his own breast, enters into a contract with the cestui que trust; if he chooses to deny it, how can the Court try that against that denial? The probability is, that a trustee who has once conceived such a purpose will never disclose it, and the cestui que trust will be effectually defrauded:" *Ex parte Lacey*, 6 Ves. 627. Lord *Thurlow*, indeed, in *Fox* v. *Mackreth*, when he dissolved the injunction granted by the Master of the Rolls, (see ante, p. 134), and in his judgment, intimated an opinion that it was extremely material to ascertain the value of the estate purchased by Mackreth from Fox, his cestui que trust, and proposed to direct an inquiry for that purpose. Ultimately, however, he did not direct any such inquiry, and he afterwards admitted that he was wrong in dissolving the injunction. *Fox* v. *Mackreth*, therefore, was decided, not upon the ground that

Mackreth had purchased the estate at an under-value, but that he had purchased it from his cestui que trust while the relation of trustee and cestui que trust continued to subsist between them, and without having communicated to Fox the knowledge of the value of the estate which he had acquired as trustee; for if the relation of trustee and cestui que trust had been clearly dissolved, and Mackreth had made Fox fully acquainted with the knowledge which he had acquired of the value of the estate, the purchase would not have been set aside. "In the case of *Fox* v. *Mackreth*," says Lord *Eldon*, "so much referred to, and now become a *leading authority*, in which I have now Lord *Thurlow's* own authority for saying he went upon a clear mistake in dissolving the injunction, it was never contended that if Fox, in a transaction clear of suspicion (but which must be looked at with the most attentive jealousy), had discharged Mackreth from the office of trustee, he would not have been able to hold the purchase. Why? because, being no longer a trustee, he was not under an obligation not to purchase. But we contended, that it was not in the power of Fox to dismiss him; that the trust was accepted under an express undertaking to the friends of Fox, that the trustee should not be dismissed without their privity; that Fox himself had too much imbecility of mind as to these transactions: and we contended, that between the dates of Mackreth's taking upon himself the character of trustee and purchasing, he had acquired a knowledge of the value of the estate, by sending down a surveyor at the expense of the cestui que trust, which was not communicated to the cestui que trust even at the moment of the supposed dissolution of the relation between them; and, under these circumstances, we contended that Mackreth remained a trustee. This was the principle upon which the cause was decided. Either that cause ought to have been decided in favour of Mackreth, or this Court originally, and the House of Lords finally, were right in refusing an issue to try whether the estate was of the value Mackreth gave, or of a greater value at that time. Upon this principle, that was an immaterial fact: for, if the original transaction was right, it was of no consequence at what price he sold it afterwards; if the original transaction was wrong, Mackreth not having discharged himself from the character of trustee, if an advantage was gained by the most fortuitous circumstances, still it was gained for the benefit of the cestui que trust, not of the trustee:" *Ex parte Lacey*, 6 Ves. 627. Lord *Eldon*, upon several other occasions, in commenting on *Fox* v. *Mackreth*, most strongly insisted that the injunction was dissolved by mistake, and that the inquiry or issue which

Lord *Thurlow*, although he ultimately refused it, at one time seemed inclined to grant, was pressed for by an argument based on a false principle, viz., that a fair price having been given in the first instance by Mackreth, he was therefore entitled to the benefit of an accidental rise in the value of the property when he sold it to Page. "I believe," says his Lordship, "that a fair price was given in the first instance; that is, as good a price as, according to what was then known, could be obtained. But the purchaser had received his information as to the value from a surveyor employed at the expense of the trust. In the judgment of this Court and the House of Lords (certainly Lord *Thurlow* having doubt, to whose doubt the utmost respect is due), Mackreth had not shaken off the character of trustee, but remained a trustee after he sold to himself; and the second sale was in equity to be considered as made, not by the purchaser, but by the trustee buying from himself; and, therefore, though the advantage was righteously obtained, it was obtained for the cestui que trust:" *Ex parte Bennett*, 10 Ves. 394.

It has, indeed, been asserted, that in *Whichcote* v. *Lawrence*, 3 Ves. 750, Lord *Rosslyn* considered, that, in order to set aside a purchase by a trustee, it is necessary to prove that an advantage has been gained by him. His Lordship, however, merely said, that he did not recollect any case in which the mere abstract rule came distinctly to be tried, abstracted from the consideration of advantage made by the purchaser, and that it would be difficult for such a case to occur: for unless advantage was made, the act of purchasing would never be questioned: and Lord *Eldon* disavowed such an interpretation of Lord *Rosslyn's* doctrine: *Ex parte Lacey*, 6 Ves. 627. See also *Ex parte Bennett*, 10 Ves. 385; *Randall* v. *Errington*, 10 Ves. 423; *Kilbee* v. *Sneyd*, 2 Moll. 186; *Ex parte Badcock*, 1 Mont. & Mac. 239; the important case of *Hamilton* v. *Wright*, 9 C. & F. 111, 123, 124, 125.

That a trustee for sale cannot purchase for himself, whatever may be the nature of the property, real or personal, in addition to the cases already cited, see *Killick* v. *Flexney*, 4 Bro. C. C. 161; *Hall* v. *Hallet*, 1 Cox, 134; *Pike* v. *Vigors*, 2 Dru. & Walsh, 262; *Price* v. *Byrne*, cited 5 Ves. 681. Nor can a third person for him, even at an auction: *Campbell* v. *Walker*, 5 Ves. 678; *S. C.*, *Sanderson* v. *Walker*, 13 Ves. 601; *Randall* v. *Errington*, 10 Ves. 423; *Watson* v. *Toone*, 6 Madd. 153; *Baker* v. *Carter*, 1 Y. & C. Exch. Ca. 250: Lord *Hardwicke* v. *Vernon*, 4 Ves. 411; *Ingle* v. *Richards*, 28 Beav. 361. And a purchase from co-trustees is equally objectionable: *Hall* v. *Noyes*, cited 3 Ves. 748; *S. C.*, 3 Bro. C. C. 483; *Whichcote* v. *Law-*

rence, 3 Ves. 940. Nor will a purchase by trustees at a public auction be sustained; for if persons who are trustees to sell an estate are there professedly as bidders to buy, that is a discouragement to others to bid. The persons present, seeing the seller there to bid for the estate to or above its value, do not like to enter into that competition: *Ex parte Lacey*, 6 Ves. 629; *Ex parte James*, 8 Ves. 348; *Whichcote* v. *Lawrence*, 3 Ves. 740; *Attorney-General* v. *Lord Dudley*, Coop. 146. Nor can a trustee be allowed to purchase the trust property, by his retirement from the trust with that object in view: *Spring* v. *Pride*, 12 W. R. (V.-C. W.), 510; 10 Jur. N. S. 646. Nor could a trustee purchase before the Master under a decree for sale. (See *Price* v. *Byrne*, cited 5 Ves. 681; *Cary* v. *Cary*, 2 S. & L. 173: but see *Wren* v. *Kirton*, 8 Ves. 502.) Nor can a trustee purchase from the assignees of his cestui que trust in bankruptcy under an agreement to divide the profits, more especially if the purchase-money consists of part of the trust funds: *Vaughton* v. *Noble*, 30 Beav. 34. Nor can a trustee purchase as agent for another person: *Ex parte Bennett*, 10 Ves. 381, 400; *Gregory* v. *Gregory*, Coop. 204.

Upon the same principle, a receiver (*Eyre* v. *M'Donnell*, 15 Ir. Ch. Rep. 534; *Boddington* v. *Langford*, Ib. 358) or an agent employed by a trustee in managing a sale cannot purchase: *Whitcomb* v. *Minchin*, 5 Madd. 91.

Where, however, a trustee has fairly sold an estate, a subsequent bonâ fide purchase of the estate from the purchaser is unobjectionable: *Baker* v. *Peck*, 9 W. R. (L. C. & L. J.), 472, reversing the decision of Sir *J. Stuart*, V.-C., Ib. 186; and see *Dover* v. *Buck*, 5 Giff. 57.

Directors of companies being trustees for the shareholders they cannot purchase shares from the chairman of the company, who is in fact their co-trustee, unless authorised so to do by the constitution of the company or the deed of settlement: *Hodgkinson* v. *The National Live Stock Insurance Company*, 26 Beav. 473; 4 De G. & Jo. 422; and see *The Imperial Mercantile Credit Association* v. *Coleman*, 6 L. R. Ch. App. 558.

So the director of a company, being a trustee for the company, is as such precluded from dealing on behalf of the company, with himself or the firm of which he is a partner, and he must account to the company for all the profits he may make by such dealing: *Aberdeen Railway Company* v. *Blaikie*, 1 Macq. Ho. Lo. 461; *Flanagan* v. *Great Western Railway Company*, 7 L. R. Eq. 116; *Albion Steel & Wire Company* v. *Martin*, 1 Ch. D. 580; *James* v. *Eve*, 6 L. R. Ho. Lo. 328, 349.

Although, however, a person may have agreed to become a director in a company forming for

the purpose of buying and carrying on a business belonging to a firm with which he is in the habit of dealing, he may afterwards, previous to the incorporation of the company, enter into contracts with the firm, and will, in the absence of fraud, not be compelled to account to the company for any profits he may have made thereby: *Albion Steel & Wire Company* v. *Martin*, 1 Ch. D. 580.

But persons about to become directors of a proposed company will not be allowed to accept money to purchase shares *to qualify them* for office from a person about to become a vendor to the company, and with whom it was their duty to deal as trustees for the company, and such money will in contemplation of a Court of Equity be held to belong to the company, and if it were applied by the directors in the purchase of shares, such shares would be considered to be unpaid for, and the directors liable on the winding up of the company to be put on the list of contributories in respect of those shares. See *In re Canadian Oil Works Corporation, Hay's Case*, 10 L. R. Ch. App. 593. There in August, 1871, the owners of certain oil works in Canada, employed their agent to get up a company in England to purchase the works, and he, through one J. L. O'Beirne, who was employed to get up a board for the proposed company, induced Sir John Hay and four others to become directors, upon the understanding that Sir John Hay was to receive from the vendors his qualification for forty 25*l.* shares. Somewhat similar arrangements were made with four other directors. Sir John Hay signed the Memorandum and Articles of Association as holder of forty shares.

By the Articles, dated the 30th of August, 1871, the vendors were to receive from the company, to be called the "Canadian Oil Works Corporation, Limited," 480,000*l.* for the oil works, 160,000*l.* in cash, and 320,000*l.* in shares. The directors were to affix the seal of the corporation to a contract already engrossed, whereby they agreed to buy the oil works for 160,000*l.* in cash, and 320,000*l.* in shares. And there was a provision that the contract was only conditional, until the directors gave notice to make it absolute before the 1st of October, 1874. On the 4th of October, the directors confirmed the contract as on the 1st of October, 1871. Certain debenture bonds, issued by the directors, having been subscribed for, to the amount of 160,000*l.*, out of this 80,000*l.* was paid to the vendors.

On the 1st of December, 1871, there was a meeting of the board of directors, at which a further payment of 58,000*l.* was made to an agent of the vendors by eight cheques, for different amounts, drawn on the bankers of the cor-

poration. Sir John Hay, who was chairman of the meeting, and another director, signed all the cheques, with the exception of one cheque for 1000*l.*, which was signed by two other directors. The latter cheque was endorsed by the agent of the company, and given by him to Sir John Hay, and was by him paid to his account at his bankers'. He then drew on his bankers a cheque for 1000*l.*, which he paid to the bankers of the company in payment of the forty 25*l.* shares. One of the other directors received a similar cheque for 1000*l.*, and paid for his shares in the same manner, and the other three directors received their qualifications in shares from the vendors; the corporation being afterwards wound up. It was held by the Lords Justices, affirming the decision of Sir *R. Malins*, V.-C., that Sir John Hay being a director of the corporation, could not retain money so paid to him by the vendors; that the money had never ceased to be the money of the corporation; that there had, in fact, been no payment by Sir John Hay of the money due in respect of the shares; and that he was liable as a contributory in respect of these shares. See also *Etna Insurance Company, In re Owens*, 7 I. R. Eq. 325, 424; *Carling's Case*, 20 L. R. Eq. 580; *McKay's Case*, 2 Ch. D. 1.

It has, however, been recently decided, that where the directors of the proposed company received from the intended vendor to the company not money but fully paid up shares, allotted to the vendor as part of the consideration for the sale, the directors, although liable to the company *for their breach of trust*, could not be put on the list as contributories in respect of such shares: *In re Western of Canada Oil, Lands, and Works Company*, 1 Ch. D. 115, where the Lords Justices discharged the order of the Master of the Rolls (reported 20 L. R. Eq. 580), but without prejudice to any application that might be made against the directors under the Companies Act, 1862, sec. 165, or otherwise, on the ground that they had entered into a corrupt bargain with the vendor. '"There certainly are three things," said *Mellish*, J., "any of which the company might do. They might say in the first instance, 'These shares never ought to have been allotted to the directors at all;' and if they were now valuable shares, they could say, 'Transfer them back to us, for you never were entitled to them.' Secondly, if the directors had sold the shares, and made a large profit out of them, the company could have said, 'Those shares were our shares, you were trustees for us, and therefore you shall hand over to us the entire profit you have made by selling them;' and thirdly, the company might say, 'Although you have

made no profit by selling these shares, yet, by having had them allotted to you, you deprived us of the power of allotting them to other persons, therefore you must pay us the sum which we have lost by reason of our being deprived of the right of allotting those shares to other persons who would have paid them up.' Of these three remedies the liquidators may, in my judgment, take whichever is most beneficial to the company. But can they do more? Can they say, 'Although the shares which you have taken, which were the property of the company, were absolutely worthless, or worth very little, both at the time when you took them, and ever since, nevertheless, inasmuch as nominally they were 100*l.* shares, we will make you liable for that full sum of 100*l.* on each share.' In my judgment that would be inflicting an arbitrary punishment on a trustee for his breach of trust. It would not be indemnifying the cestui que trust for the injury he had sustained, but would be giving him a sum which, if the breach of trust had never been committed, he would not have acquired." See and consider *Ex parte Daniell*, 1 De G. & Jo. 372.

Members, however, of a company, at a meeting duly called, may, on a sale of its business, give part of the purchase-money to the directors by way of compensation for their loss of office. See *Southall* v. *British Mutual Life Assurance Society*, 6 L. R. Ch. App. 614, in which case a clause in an agreement for the amalgamation of two insurance companies, providing that part of the purchase money should be paid to the directors of the selling company by way of bonus, was held by the Lords Justices, affirming the decision of the Master of the Rolls (reported 11 L. R. Eq. 65), not to invalidate the amalgamation. "It is said," observed *James*, L. J., "that it is a violation of the principles of this Court, that the directors should have a bonus of 600*l.* each. I agree, if this had been done secretly, in all probability it could not be supported. But it was done openly, and appeared on the face of the agreement. There was nothing in itself wrong in such an arrangement, and it was known to all the shareholders. They said, 'We are going to get rid of the chairman and the directors, and we think it right that we should give them some compensation.' It would be monstrous to say that a transaction otherwise reasonable, could be vitiated by such a clause as this."

Any secret stipulation, however, by the directors, negociating an amalgamation for a commission or a share thereof, will be set aside: *General Exchange Bank* v. *Horner*, 9 L. R. Eq. 480.

A mortgagee (*Downes* v. *Grazebrook*, 3 Mer. 200; *Waters* v. *Groom*,

11 C. & F. 684); or an annuitant (*In re Bloye's Trust*, 1 Mac. & G. 488; *S. C. nom. Lewis* v. *Hillman*, 3 Ho. Lo. 607, 630); with power of sale, being in fact a trustee for sale, cannot, either directly or by means of his solicitor, except by the express authority of his cestui que trust, purchase the estate upon which the mortgage or annuity is a charge. See also *Ingle* v. *Richards*, 28 Beav. 361.

Nor can the solicitor conducting the sale do so on his own account, at any rate without a full explanation to the parties interested, and putting them in full possession of the facts, and a knowledge that he was to become purchaser for himself. *Ib.* See also *Orme* v. *Wright*, 3 Jur. 19; *Robertson* v. *Norris*, 1 Giff. 421, 428; 4 Jur. N. S. 155.

A mortgagee, however, does not ordinarily stand in a fiduciary position towards the mortgagor, so as to render a purchase of the equity of redemption by him from the mortgagor (*Knight* v. *Majoribanks*, 2 Mac. & G. 10; and see *Webb* v. *Rorke*, 2 S. & L. 661, 673; *Waters* v. *Groom*, 11 C. & F. 684; *Dobson* v. *Land*, 8 Hare, 220; *Rushbrook* v. *Lawrence*, 8 L. R. Eq. 25; 5 L. R. Ch. App. 3); or from a prior mortgagee selling under a power of sale (*Shaw* v. *Bunny*, 33 Beav. 494; 2 De G. Jo. & Sm. 468), impracticable, even, it seems, although the purchaser be a second mortgagee with a trust for sale: *Kirkwood* v. *Thompson*, 2 Hem. & Mill. 392; 2 De G. Jo. & Sm. 613; *Locking* v. *Parker*, 8 L. R. Ch. App. 39. See, however, *Parkinson* v. *Hanbury*, 1 Drew. & Sm. 143. But where the conveyance with a trust for sale is to a third person, he, being a trustee for both parties, will be unable to purchase: *Blennerhassett* v. *Day*, 2 Ball. & B. 104, 133.

Transactions, however, between mortgagor and mortgagee are viewed with considerable jealousy, and the sale of the equity of redemption will be set aside where, by the influence of his position, the mortgagee has purchased for less than others would have given, and where there are circumstances of misconduct in obtaining the purchase: *Ford* v. *Olden*, 3 L. R. Eq. 461; and see *Prees* v. *Coke*, 6 L. R. Ch. App. 645, 649. There a mortgagee, who was also a solicitor, obtained a conveyance from the mortgagor, a man in humble circumstances, without a legal adviser; and it was held, that the onus of justifying the transaction, and showing that it was right and fair, was thrown upon the mortgagee.

As to a lease from the mortgagor to the mortgagee, see *Ford* v. *Olden*, 3 L. R. Eq. 461; *Hickes* v. *Cooke*, 4 Dow, 16.

Where, in a deed creating a trust, there are provisions by which the trustees making certain advances, and paying off part of a

mortgage debt, should be entitled to a charge on the estate ; it seems even if a trustee making such an advance, were entitled to have such a mortgage on the estate as would empower an ordinary mortgagee to foreclose, the Court would not allow him, by reason of his fiduciary position, to take such a step, as being inconsistent with his duty as trustee to preserve the estate. See *Tennant* v. *Tennant*, 4 L. R. Ch. App. 544, where Lord *Hatherley*, C., observed, "It is the duty of every trustee to make the most he can of the trust property for the benefit of the cestui que trust, and the only possibility of saving the estate must be by selling some portion of it. As mortgagee, he is not at all interested in doing that, but is interested in foreclosing the estate ; and when he has foreclosed he will become master of the estate, and the whole of the trust which he is bound to protect will be entirely frustrated. So again, if he were only cestui que trust and not mortgagee, or only trustee and not mortgagee, on a bill being filed for foreclosure, he would immediately try to sell all the property to the greatest advantage, in order to realise sufficient to pay off the mortgage, and save the estate from destruction. But from the first moment that he becomes mortgagee, it is greatly to his interest that the estate should be at once foreclosed. This case must be put upon the broad principle, that the trustee is in a position in which it is impossible for him, if a foreclosure is granted, to make the performance of his duty coincide with his interest; and therefore this Court would be bound, even if the mortgage deed gave him the power of foreclosure, to say that it was impossible to allow him to foreclose when his duty was to take every possible step for the saving of the estate. In that respect the other observations made by Lord *Brougham* in *Hamilton* v. *Wright* (9 C. & F. 123) are of very considerable force, though the doctrine is so well recognised in this Court that the authority of the House of Lords was scarcely required to affirm it."

The question has been raised whether one of the trustees of a charity can himself with propriety become a mortgagee of the charity property. It was decided in the affirmative in the case of *Attorney-General* v. *Hardy*, 1 Sim. N. S. 338. There the trust deeds of a certain Wesleyan chapel contained powers of raising money by mortgage for purposes of the trust. It was held by Lord *Cranworth*, V.-C., that any of the trustees of the chapels might be mortgagees under this power, and that, if they were such mortgagees, they might exercise all the rights of mortgagees, although in opposition to their trusts. His Lordship even went so far as to

observe, "that the money should be advanced by one of the trustees was natural and quite proper."

The authority of this case seems to be at least doubtful, as it clearly falls within the principle of these decisions, that a person holding a fiduciary character shall not be allowed to put himself in a position where his interest conflicts with his duty. Now, in the case before Lord *Cranworth*, it was the interest of the mortgagee to get as high a return for his money as he possibly could; it was his duty as trustee on behalf of the trust to obtain the money upon the easiest terms for the trust; moreover, some of the rights of the mortgagee, as Lord *Cranworth* admits, are in opposition to the trusts; that, for instance, of foreclosure, is, in fact, if allowed to be carried out by the trustee-mortgagee, an extinguishment of the trust altogether. In the analogous case of *Forbes* v. *Ross* (2 Cox, 113), it was held by Lord *Thurlow*, C., that trustees having power to lend money on personal security, could not lend it to one of themselves, so that he should benefit thereby, his Lordship observing that "he proceeded upon this single ground that *a trustee cannot bargain with himself so as to derive, through the medium of the contract, any degree of forbearance or advantage whatever to himself.*" This principle is undoubtedly sound, and it appears to be applicable to a case of a mortgage of the trust property to a trustee, as well as to the case of a loan of the funds of the trust to him.

There is no rule in equity which prevents a surviving partner from purchasing the share of a deceased partner from his representatives (*Chambers* v. *Howell*, 11 Beav. 614), or which prevents one of several residuary legatees from buying the share of another, or purchasing for less than the amount a charge on the share of another: *Barwell* v. *Barwell*, 34 Beav. 371.

A trustee cannot take a lease from himself: *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 500. And with so great jealousy does the Court look upon a trustee becoming a lessee of the trust property, that even in a case where a testator had given a trustee power to become lessee, he was removed, principally upon the ground that he was placed in a position in which his interest necessarily came in conflict with his duty: *Passingham* v. *Sherborn*, 9 Beav. 424.

Governors and trustees of a charity cannot grant a lease to, or in trust for, one of themselves (*Attorney-General* v. *Dixie*, 13 Ves. 519, 534; *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 491, 500), nor insert in a lease any stipulation or covenant for their own private advantage: *Attorney-General* v. *Mayor of Stamford*, 2 Swans. 592, 593; *Attorney-Gene-*

ral v. *The Corporation of Plymouth*, 9 Beav. 67. The same rule applies to a member of a corporation taking a lease of the corporate property: *Attorney-General* v. *Corporation of Cashel*, 3 Dru. & W. 294.

But although a trustee cannot purchase from himself, he can purchase from a cestui que trust, who is sui juris, and has discharged him from the obligation which attached upon him as trustee. "Although," observes Lord *Eldon*, "a trustee who is intrusted to sell and manage for others undertakes at the same moment in which he becomes a trustee, not to manage for the benefit and advantage of himself, it does not preclude a new contract with those who have intrusted him. It does not preclude him from bargaining that he will no longer act as trustee. The cestui que trust may, by a new contract dismiss him from that character: but even then that transaction, by which they dismiss him, must, according to the rules of the Court, be watched with infinite and most guarded jealousy; and for this reason, that the law supposes him to have acquired all the knowledge a trustee may acquire, which may be very useful to him, but the communication of which to the cestui que trust the Court can never be sure he has made, when entering into the new contract by which he is discharged:" *Ex parte Lacey*, 6 Ves. 626. So, in the principal case, it was fully admitted that Mackreth might have dealt with Fox for the purchase of the trust estate, had he done so without taking an undue advantage of his position as trustee, and the knowledge he had acquired in that character. In *Coles* v. *Trecothick*, 9 Ves. 234, a purchase, by a trustee, under a trust to sell for payment of debts, of the trust property, as agent of his father, both of whom were creditors and in partnership, was sustained, upon the ground that the trustees did not appear to have interfered in the business up to the sale, otherwise than that they sanctioned the acts of the cestui que trust, and that the cestui que trust had full information, and the sole management of the sale, making surveys, settling the particulars, and fixing the prices of the lots, and specific performance of the agreement to purchase was decreed by Lord *Eldon* in favour of the trustee for sale. "As to the objection," observed his Lordship, "to a purchase by the trustee, the answer is, that a trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the cestui que trust intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee, of information acquired by him in the character of trustee. I admit it is a

difficult case to make out, wherever it is contended that the exception prevails. The principal was clearly recognised in *Fox* v. *Mackreth*, and was established long before. The principle upon which I ever held that case right stands upon this only: not that Mackreth might not have purchased from Fox, and would not have been entitled to the increase; but that he had not been placed in circumstances to make that contract." See also *Morse* v. *Royal*, 12 Ves. 355, and *Clarke* v. *Swaile*, 2 Eden, 134, in both which cases purchases by trestees were, though with some reluctance, sustained: and see the remarks of Sir *J. Romilly*, M. R., in *Denton* v. *Donner*, 23 Beav. 285; see too *In re M'Kenna's Estate*, 13 Ir. Ch. Rep. 239; *Beale* v. *Billing*, Id. 250; *Luff* v. *Lord*, 34 Beav. 220; *Franks* v. *Bollans*, 3 L. R. Ch. App. 717.

In a recent case, where, however, the suit was a friendly one, a purchase by the trustees of a settlement, from the surviving trustee for the sale of property was sustained, although the latter, who was a solicitor, acted in the conduct of the purchase (but with perfect propriety) for the trustees, who took no active part therein. See *Hickley* v. *Hickley*, 2 Ch. D. 190.

A solicitor, however, of the cestui que trust has no general authority to consent to a purchase by the trustee: *Downes* v. *Grazebrook*, 3 Mer. 209.

Merely nominal trustees, as for instance a trustee who has disclaimed, without ever acting in the trust, may become a purchaser (*Stacey* v. *Elph*, 1 My. & K. 195; *Chambers* v. *Waters*, 3 Sim. 42), as may also a mere trustee to preserve contingent remainders: *Parkes* v. *White*, 11 Ves. 209, 226.

Under the statutes for the redemption of the land tax, the Lords Commissioners are placed in the position of vendors; and therefore, if trustees should purchase the property of the trust under those acts, as they would not be purchasing from themselves but from the Lords Commissioners, the transaction would be valid: *Beaden* v. *King*, 9 Hare, 499; But see and consider *Grover* v. *Hugel*, 3 Russ. 428.

A trustee for infants or persons under disability cannot purchase the trust estate, unless by leave of a Court of equity, because persons not sui juris cannot enter into any contract with him which would have the effect of removing him from the character of trustee, which, as we have already seen, can be done by cestui que trust, who are sui juris. The only terms upon which such trustees may purchase, "is a bill filed: and the trustee saying so much is bid, and that he will give more. The Court would examine into the circumstances; ask who had the conduct of the transaction; whether there is any reason to suppose the premises could be sold better; and,

upon the result of that inquiry, would let another person prepare the particular and let the trustee bid:" per Lord *Alvanley*, M. R., *Campbell* v. *Walker*, 5 Ves. 682; *S. C.*, 13 Ves. 601. See also 1 Ball & B. 418, and *Farmer* v. *Dean*, 32 Beav. 327; *Aberdeen Railway Co.* v. *Blackie*, 1 Macq. H. L. C. 472.

These principles apply with peculiar force to a committee of a lunatic's estate. The Court has even gone so far as to refuse to confirm a lease to a committee, though it was approved by the Master as beneficial to the estate of the lunatic. Shelf. on Lunacy, 446.

The circumstance that two parties stand towards each other in the relation of trustee and cestui que trust does not affect any dealing between them unconnected with the subject of the trust: *Knight* v. *Majoribanks*, 2 Mac. & G. 10.

The doctrine which is applicable to purchases by trustees applies also to purchases by persons acting in any fiduciary capacity, which imposes upon them the obligation of obtaining the best terms for the vendor, or which has enabled them to acquire a knowledge of the property.

An agent or solicitor employed to sell cannot purchase from his principal, unless he make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed (*Lowther* v. *Lowther*, 13 Ves. 103; and see the great case of *The York Buildings Company* v. *Mackenzie*, 8 Bro. P. C. 42, Toml. ed.; and see *S. C.*, 3 Paton's Scotch App. Cas. 578, 579, where the judgments of Lord *Thurlow* and Lord *Loughborough* are given at length; *Watt* v. *Grove*, 2 S. & L. 492; *Whitcomb* v. *Minchin*, 5 Medd. 91; *Woodhouse* v. *Meredith*, 1 J. & W. 204; *Oliver* v. *Court*, 8 Price, 127); and the moment it appears in a transaction between principal and agent that there has been any underhand dealing by the agent, —that he has made use of another person's name as the purchaser, instead of his own,—however fair the transaction may be in other respects, from that moment it has no validity in equity: *Trevelyan* v. *Charter*, 9 Beav. 140; *Charter* v. *Trevelyan*, 11 C. & F. 714; *Lewis* v. *Hillman*, 3 H. L. Cas. 607; *Walsham* v. *Stainton*, 1 De G. Jo. & Sm. 678. See also *Murphy* v. *O'Shea*, 2 J. & L. 420, in which case it was argued that there was no proof that lands were sold to an agent at an undervalue. Sir *Edward Sugden*, L. C., however, observed, "It is perfectly well settled that it is not necessary to prove under-value. A principal selling to his agent is entitled to set aside the sale upon equitable grounds, whatever may have been the price obtained for the property." In *Crowe* v. *Ballard*, 3 Bro. C. C. 117, Lord *Thurlow* thought that the person

employed to sell could not be permitted to buy, and even if that were done with the knowledge of the party selling, it could not be supported; and that the principle must prevail, even if he had bought fairly. Lord *Thurlow*, however, it is conceived, did not mean to lay down, as a general rule, that an agent could in no case purchase from his principal; he spoke probably with reference to the case he was deciding, which was one of gross fraud. At any rate, it is clear now, that an agent to sell can purchase from his employer, if he comply with the rule laid down in *Lowther* v. *Lowther*. See also *Wentworth* v. *Lloyd*, 32 Beav. 467, affirmed Dom. Proc. 10 Jur. N. S. 960.

An agent for sale who takes an interest in a purchase negotiated by himself, is bound to disclose to his principal the exact nature of his interest; and it is not enough merely to disclose that he has an interest, or to make statements such as would put the principal on inquiry: *Dunne* v. *English*, 18 L. R. Eq. 524; *Liquidators of The Imperial Mercantile Credit Association* v. *Coleman*, 6 L. R. Ho. Lo. 189, 194; *Fawcett* v. *Whitehouse*, 1 Russ. & My. 132; *Hichens* v. *Congreve*, 1 Russ. & My. 150, n.

In such a case the burden of proving that a full disclosure was made lies on the agent, and is not discharged merely by the agent swearing that he did so, if his evidence is contradicted by the plaintiff, and not corroborated: *Dunne* v. *English*, 18 L. R. Eq. 524.

The same objections apply to an auctioneer employed to sell property: *Oliver* v. *Court*, 8 Price, 127, 160; *Baskett* v. *Cafe*, 4 De G. & Sm. 388.

An agent for sale, when he has once made the contract and terminated his agency, may purchase the property he has sold. As, for instance, in the case of an auctioneer, when he has knocked the estate down, and made the written contract, when it may be said that his agency has terminated: *Parker* v. *M'Kenna*, 10 L. R. Ch. App. 126, per *Mellish*, L. J. But even in that case the Court would look with considerable suspicion on a repurchase by such an agent as an auctioneer, from the person to whom he sold the estate, because it would always be extremely difficult to find out whether there had not been some previous concert and understanding between them: *Ib.*

As long, however, as the contract remains executory, and the trustee or agent has power either to enforce or to rescind or alter it, he cannot repurchase the property from his own purchaser, except for the benefit of his principal. See *Parker* v. *M'Kenna*, 10 L. R. Ch. App. 96. There the defendants, Sir J. M'Kenna, Vanderbyl, Harvey

Lewis, and Henshaw, were, in 1864, four of the directors of the National Bank of Ireland. On the 16th of February of that year resolutions were passed to increase the capital by the issue of 20,000 new 50*l.* shares, which were to be offered to the old shareholders at the rate of one new share for each old share held by them, each allottee paying for each share 25*l.* premium, and 5*l.* as a first call. On the 24th of February, 1864, the directors, by a circular to the shareholders, amongst other things stated as follows:—"The directors had entered into a provisional arrangement *with certain capitalists*, who *are* bound to take over every unaccepted new share at an extra premium of 5*l.*, making the total premium, as it will be taken up by them, 30*l.* On the day previous to the issuing of the circular it seems the directors had entered into an arrangement with a single individual named Stock, under which he was to take, at a premium of 30*l.*, all the shares not taken by the old shareholders. The old shareholders left 10,453 shares untaken. On the 19th of April the directors (at a meeting where the defendants were present) allotted 9778 of the 10,453 shares to Stock, and the residue to other persons. An arrangement was made by the directors with Stock that the certificates of the shares allotted to him should be withheld by the bank, and that the bank should have a lien on the shares for the sum of 30*l.* per share, and that no share should be registered until payment to the bank of the sum of 30*l.* per share on the shares so transferred.

The defendants afterwards took a considerable number of shares, at 30*l.* per share, from Stock, as they alleged in their answers, at his request, and in order to relieve him from the difficulty he found himself under in having so many shares thrown upon his hands, the 30*l.* per share being paid into the bank at the times when the shares were respectively registered in the names of the purchasers. The defendants disposed of the shares procured from Stock at a considerable profit, viz., Sir J. M'Kenna, 15,750*l.*; Harvey Lewis, 10,020*l.*; Vanderbyl, 11,447*l.* It was held, by the full Court of Appeal, affirming the decision of Sir *James Bacon*, V.-C., that the defendants ought respectively to account to the bank for the profits made by them respectively by the sale of the shares. In giving judgment, Lord *Cairns*, L. C., said, "In the fulfilment and execution of this contract, who were to watch the interests of the bank? Undoubtedly the directors of the bank. They were the agents of the bank for this purpose. If they did not watch the fulfilment of the contract there was no person else to do it. Their agency would not come to an end with regard to their shares until the

contract was completely fulfilled; and their agency at the date which I have referred to, namely, the allotment to Stock, not only had not come to an end, but was actually only in reality commencing . . . . . Now the rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can, in this Court, acting as an agent, be allowed to put himself into a position, in which his interest and his duty will be in conflict. If Stock had bought these shares and paid for them, and become the absolute owner of them, the directors were as free as any person in the market to go to Stock and to become the purchasers from him of those shares. The agency in that case would have been over, and there would have been no longer any conflict between interest and duty. Here the agency had not terminated. The Court will not inquire, and is not in a position to ascertain, whether the bank has lost or not lost by the acts of the directors. All that the Court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency, and the Court finds, in my opinion, that these agents, in course of their agency, have made a profit, and for that profit they must, in my opinion, account to their principal." See *Re Hay's Case*, 10 L. R. Ch. App. 593.

With regard to an agent employed in the management of an estate, "The rule of the Court," observes Sir *Edward Sugden*, L.C. of Ireland, "does not prevent an agent from purchasing from his principal, but only requires that he shall deal with him at arm's length, and after a full disclosure of all that he knows with respect to the property:" *Murphy* v. *O'Shea*, 2 J. & L. 425.

But it seems that a purchase by a person acting in that capacity from his principal, or the cestui que trust of his principal, will be set aside upon the ground alone, that the vendor had no competent or disinterested adviser: *King* v. *Anderson*, 8 I. R. Eq. 625, reversing *S. C.*, *Ib.* 150. See also *Ahearne* v. *Hogan*, 1 Dru. 310; *Rossiter* v. *Walsh*, 4 Dru. & W. 485.

An agent or steward may also take a lease from his employer or principal; (*Lord Selsey* v. *Rhoades*, 2 S. & S. 41; 1 Bligh, N. S. 1); but it must always be difficult to sustain such a lease in a court of equity, as it must be proved that full information has been imparted, and that the agreement has been entered into with perfect good faith: *Malony* v. *Kernan*, 2 D. & W. 31.

If an agent employed to make a purchase purchases for himself, he will be held a trustee for his prin-

cipal: *Lees* v. *Nuttall*, 1 Russ. & My. 53; *S. C.*, 1 Taml. 282. So, also, if he is employed to obtain a lease, he shall not take it for his own benefit (*Taylor* v. *Salmon*, 4 My. & Cr. 134); nor will an agent employed to settle a debt due from his principal be permitted to derive any benefit from it by purchasing it himself; because it is his duty on behalf of his employer, to settle the debt upon the best terms he can obtain; and if he is enabled to procure a settlement of the debt for anything less than the whole amount, it would be a violation of his duty to his employer, or at least would hold out a temptation to violate that duty, if he might take an assignment of the debt he was employed to settle, and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle: if, therefore, an agent obtained under these circumstances an assignment of a debt due from his principal, he would be held a trustee for his principal, and would only be entitled to the sum he actually paid for the debt: *Reed* v. *Norris*, 2 My. & Cr. 374.

Nor will an agent employed to purchase be permitted, unless by the plain and express consent of his principal, to make any profit by becoming a seller to him. This doctrine is recognised by Lord *Thurlow* in *East India Company* v. *Henchman*, 1 Ves. jun., 289, where he observes, "If, being a factor, a man buy up goods which he ought to furnish as factor, and, instead of charging porterage duties, or accepting a stipulated salary, he takes the profits, and deal with his constituent as a merchant, this is a fraud for which an account is due." See *Kimber* v. *Barber*, 8 L. R. Ch. App. 56. There the defendant, Barber, knowing that the plaintiff was anxious to obtain shares in a certain company, on the 19th of January, 1870, called on the plaintiff, and informed him that he, Barber, knew of 264 shares at 3*l*. Barber was then authorised by Kimber to buy the shares at 3*l*. The shares were accordingly bought, sixty-four of them were transferred to Kimber, and 200 to his nominee, one T. G. Taylor, a broker, being the transferor, and Kimber paying Barber 795*l*. for the shares and the transfer duty.

It appeared subsequently that Barber, being aware of the plaintiff's desire to obtain the shares, on the 13th of January, wrote to Jones, asking as for a friend, whether he would sell his shares, and on the 17th of January concluded an agreement with Jones for the purchase of the shares, at 2*l*. a share, and forwarded him a blank transfer. After the interview between the plaintiff and Barber, on the 19th of January, Barber instructed Taylor to prepare bought and sold notes to the effect that the shares had been bought through Taylor, as the

broker, and the shares were afterwards transferred by Jones to Taylor. As Barber had not sufficient money to pay for all the shares, some of them were lent to him by Taylor, for the purpose of being transferred to Kimber. Kimber had transferred ten out of the sixty-four shares to other persons, so that at the time when the bill was filed, he held only fifty-four shares. Lord *Romilly*, M. R., dismissed the bill without costs, holding that no relief could be given to the plaintiff, as he had transferred 210 out of the 264 shares, and had thus rendered it impossible to set aside the transaction. It was held, however, by Lord *Selborne*, L. C., reversing the decree of the Master of the Rolls, that as Barber purchased the 264 shares from Jones, as agent for the plaintiff, the plaintiff was entitled to the benefit of that purchase, and that Barber ought to pay to the plaintiff the sum of 264*l.*, being the difference between the prices paid by the plaintiff and Barber. "It seems to me," said his Lordship, "the common relief—the relief which was given in *Hichens* v. *Congreve* (4 Russ. 562, 577), *Bank of London* v. *Tyrell* (10 Ho. Lo. C. 26), and in other cases too numerous to mention." See also *Morison* v. *Thompson*, 9 L. R. Q. B. 480; *Great Luxembourg Railway Company* v. *Magnay*, 25 Beav. 586.

If an agent employed by his principal to obtain another to do work for him, for instance, as a sub-contractor, it would be fraud cognisable in equity if the agent entered into a contract at a preposterous price in order that he and the sub-contractor might divide the profits to accrue from it. *Holden* v. *Webber*, 29 Beav. 117, 120; in which case, however, under peculiar circumstances, the Court refused to grant any relief. There the plaintiff Holden, a contractor for works on a railway, employed Cowdy as his agent to get a sub-contractor to do a portion of the works. Cowdy accordingly, as agent, entered into a contract with Webber. An allowance of 5*l.* per cent was made by Webber to Cowdy. After the work had been finished, Holden filed a bill against Webber and Cowdy to set aside the contract between him and Webber, to restrain Webber from proceeding against him at law for the balance due to him on the contract, and that Cowdy might be decreed to pay to him the sums received or retained by him on account of such contract. It appeared in evidence that Cowdy had been the means of obtaining the contract for the plaintiff from Messrs. Peto and Betts, for which he was to receive 5*l.* per cent. from the plaintiff. It was admitted that Webber had made to Cowdy an allowance of 5*l.* per cent. on his contracts, that it was the ordinary practice of the trade to make such an allowance to an agent obtaining a contract,

and that the plaintiff had been in the habit of doing so himself. Sir *J. Romilly*, M. R., dismissed the bill. "I am not," said his Honor, "at all satisfied as to what was the situation of Cowdy with respect to Webber, whether, in fact, the services which he performed, the inquiries which he made, and the superintending various matters, were to be considered as acts of agency done for the plaintiff; for if not, this might properly be paid for by Webber. The situation between the parties, and their relative rights and positions, are not clearly ascertained by the evidence in this case; and, in addition to these circumstances, there also appears to be, that which I cannot call a custom (a word which has a legal and a technical meaning), but rather a practice which prevails on the part of contractors of giving to the officers and servants of the railway companies who obtain these contracts for them, remuneration in the shape of commission on the price of the work to be done. Now, whether it is a gift or calculated as commission is a matter of very little importance; but that this practice prevailed, and that the plaintiff knew it prevailed, and was himself in the habit of acceding and conforming to it, is, in my opinion, established by the evidence in the case. I think he must have known what occurred in that respect, or must have had good reason to believe, if he had turned his attention to the subject, that such was the course adopted here." And after dismissing the bill as against Cowdy without costs, without prejudice to the plaintiff bringing any action against him, his Honor said, "I wish that no decree of mine should fetter the question, but I mean to express nothing that can be construed into an encouragement of the practice I have alluded to."

So where an agent employed by one principal to a contract, surreptitiously enters into dealings for his own benefit with the other principal, which conflict with the performance of the duties he has undertaken to perform for his own principal, such dealings will be cognisable as a fraud by the Court of equity. See *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha, and Telegraph Works Co.*, 10 L. R. Ch. App. 515. There the defendants, a Telegraph Works Company, agreed with the plaintiffs, a Telegraph Cable Company, to lay a cable, the cable to be paid for by a sum on the order being given, by twelve instalments upon certificates of the Cable Company's engineer (Sir C. T. Bright), that the manufacture of the cables was making sufficient progress to entitle the contractors thereto, another sum to be payable on shipment, and the remainder on the cable's being completely laid, and certified by the Cable Company's engineer. Soon afterwards the engineer, who had contracted to

lay other cables for the defendants, agreed with them, without the knowledge of the plaintiffs, to lay this cable also for a sum of money to be paid to him by instalments, payable by the Works Company, when they received the instalments from the plaintiffs. The plaintiffs paid the Works Company, upon the order for the cable being given, 40,000*l.*, and to Sir C. T. Bright, their engineer, 600*l.*, being his commission thereupon. It was held by the Lords' Justices, affirming the decision of Sir R. *Malins*, V.-C., that the agreement between the engineer and the Works Company was a fraud, which entitled the Cable Company to have their contract rescinded, and to have the sums of 40,000*l.*, and 600*l.*, repaid to them. "According to my view of the law of this Court," said *James*, L. J., "I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal, is a fraud on such other principal, cognisable in this Court . . . . If you find a case where, in the contemplation of this Court, a principal is conspiring with a servant of the other principal to cheat his master in the execution of a contract, then in common sense, common justice, common honesty, and in this Court the master is entitled to say, 'I will have nothing more to do with the business,' and in this Court a surreptitious sub-contract with the agent is regarded as a bribe to him for violating or neglecting his duty. I might have been content to allow this case, as far as I am concerned, to have been based upon the application of a plain principle of equity, which is to be enforced, without regard to the particular circumstances of the case—upon the general rule which Lord *Eldon* laid down in the case of *ex parte James* (8 Ves. 337, 345, referred to by the Vice-Chancellor—that is, that you must act on general principles, without regard to the particular facts or the particular conduct or misconduct of the parties in a particular case. You must act upon the general principle from the impossibility which the Court finds itself in of ever ascertaining the real truth of the circumstances of which this case is a wonderfully strong exemplification. But I cannot content myself with disposing of this case merely on that general principle, and only saying that it is the general principle which has put aside and has crushed this contract. Although the parties may not have thought that they were doing anything wrong, yet, when I put together the two contracts—the contract between the plaintiff company and the defendant company, and the contract between the defendant company and Sir Charles Bright—the engineer on the other side, and see that the money to be paid to Sir Charles Bright is not

money to be paid when he has completed, or is completing, the sub-contract as a reward for work and labour, but is money to be paid out to him time after time, exactly when and as he shall have certified money to have been due and payable by one company to the other, then I say that this is a contract as to which *res ipsa loquitur*, and of which I am bound to express my strongest disapprobation and reprehension." See also *Etna Insurance Co., In re Owens*, 7 I. R. Eq. 325, 424.

Upon the same principle, where one of several partners was employed to purchase goods for the firm, and he, unknown to his co-partners, purchased goods of his own at the market price, and made considerable profit thereby: It was held by Sir *J. Romilly*, M. R., that the transaction could not be sustained, and that he was accountable to the firm for the profit thus made: *Bentley* v. *Craven*, 18 Beav. 75; *Williams* v. *Trye*, *Ib.*, 366, 371; *Perens* v. *Johnson*, 3 Sm. & G. 419; *Burton* v. *Wookey*, 6 Madd. 367. So in *Richie* v. *Couper*, 28 Beav. 344, it was held that one of several co-owners of a ship, who acted as ship's husband, was only entitled to charge the cost price of supplies to the ship furnished by him in the course of his business. See also *Beck* v. *Kantorowicz*, 3 K. & J. 230. So, also, in *Massey* v. *Davies*, 2 Ves. 317, an agent for a colliery, who it was stipulated was to have no emolument beyond his salary, was decreed to account for the profits made by selling to his principal timber belonging to himself and another person, with whom he had clandestinely entered into partnership, under the name of that person. In this case the partner was held to have no knowledge that the agent was acting contrary to his trust; otherwise he would have been held bound, for not only the agent acting contrary to his trust, but a man who, knowing the agent to be guilty of a breach of trust, entered into a transaction with him, will be answerable; and see *Turnbull* v. *Garden*, 38 L. J. (Ch.), 331, 334; *Kimber* v. *Barber*, 8 L. R. Ch. App. 56; *Morison* v. *Thompson*, 9 L. R. Q. B. 480.

Upon the same principle, where a person is employed as a stock-broker, if he himself purchase the stock of his employer, or sell his own stock to him, without his knowledge, such sales and purchases will be set aside. See *Brookman* v. *Rothschild*, 3 Sim. 153; 2 D. & C. 188; 5 Bligh, N.S., 165. So in *Gillett* v. *Peppercorne* (3 Beav. 78), the plaintiff employed the defendant, a stockbroker, to purchase some canal shares, and he bought them from a person who, though ostensibly owner, was a mere trustee for himself: Lord *Langdale*, M. R., set aside the sale with costs. "It is said," observed his Lordship, "that this is every day's practice in the city. I certainly should be very sorry to have

it proved to me that such a sort of dealing is usual; for nothing can be more open to the commission of fraud than transactions of this nature. Where a man employs another as his agent, it is on the faith that such agent will act in the matter purely and disinterestedly for the benefit of his employer, and assuredly not with the notion that the person whose assistance is required as agent has himself in the very transaction an interest directly opposed to that of his principal." See also, *The Bank of Bengal* v. *Macleod*, 7 Moore, P. C. C. 35, 46; *Kimber* v. *Barber*, 8 L. R. Ch. App. 56. See Sug. Prop. 662.

Upon the same principle a solicitor employed in making a purchase is accountable to his clients for the benefits which he may have derived clandestinely from a sale to them of his own property. See *The Bank of London* v. *Tyrrell*, 27 Beav. 273: there a solicitor was active in founding a banking company. Before its establishment he entered into a secret arrangement with a stranger, that the latter should purchase some property eligible for the banking-house on a joint speculation. After its establishment the company purchased part of the premises for their banking-house, not knowing that their solicitor was interested in it. It was held by Sir *John Romilly*, M. R., whose decision was affirmed by the House of Lords (10 Ho. Lo. Ca. 26, *nom.* *Tyrrell* v. *The Bank of London*), that the solicitor ought to account to the company for all the profit made by him in the transaction, but that the stranger was under no such liability. See also *Chaplin* v. *Young*, 33 Beav. 414.

A solicitor having, under a decree, the conduct of a sale, is under an absolute incapacity to purchase at it: *Atkins* v. *Delmege*, 12 Ir. Eq. Rep. 1. And see *In re Ronayne's Estate*, 13 Ir. Ch. Rep. 444.

And the better opinion seems to be that, although a solicitor may not under a decree actually have the conduct of the sale, if he has intervened on behalf of parties interested in the sale so as to render it his duty toward them to assist in procuring the best price for the property offered for sale, he ought not to be allowed to purchase it for himself. See *Guest* v. *Smythe*, 5 L. R. Ch. App. 551. There B. Gibbons, a mortgagee for 8,000*l.*, and J. Guest, his sub-mortgagee, in 1863 instituted a suit against the persons interested in the equity of redemption of the mortgaged property. B. Gibbons died, and the suit was revived by Emily Gibbons, his personal representative. Mr. Wight was solicitor for the plaintiffs in the suits of *Gibbons* v. *Gibbons* and *Berry* v. *Gibbons*, instituted for the administration of the estate of B. Gibbons. On the 23rd of January, 1865, a decree was made in *Guest* v.

Smythe, directing a sale in case of non-payment of what should be found due on the mortgage. On the 19th of April, 1869, Mr. Wight applied in *Gibbons* v. *Gibbons* for leave to apply in *Guest* v. *Smythe*, for an order enabling the plaintiff in *Gibbons* v. *Gibbons* to attend the proceedings, which leave was given. On the 13th of July, 1869, Mr. Wight got the consent of the solicitors to the plaintiff in *Guest* v. *Smythe* to his obtaining an order for the plaintiff in *Gibbons* v. *Gibbons* to attend the proceedings in *Guest* v. *Smythe*, and on the 27th of July, 1869, a summons, returnable on the 30th, was taken out for the plaintiff in *Gibbons* v. *Gibbons* to have liberty to attend the proceedings in *Guest* v. *Smythe*, upon which the order was made, but was dated on the 4th of August in consequence of the delay in obtaining an affidavit of service on some of the parties. No person attended any appointment in *Guest* v. *Smythe* until after this order had been made.

In the meantime, on the 29th of July, the mortgaged property was put up for sale. It does not appear that Mr. Wight in any way intervened in the preparations for the sale, or that he was consulted with regard to the particulars or the reserved bidding, which was fixed at 5,600*l*. On the printed particulars and conditions of sale which were issued was this notice: "Particulars and conditions of sale may be obtained in London, of the following solicitors . . . ., *and in the country of Messrs. Caldicott & Canning, Dudley; Mr. Wight, Dudley; Messrs. Hodgson & Son, Birmingham, and of the auctioneer.*"

Mr. Wight attended at the sale, and bid in person for Lot 1, which was knocked down to him at 6,110*l*. The chief clerk certified the result of the sale on the 3rd of August, and the certificate was signed and approved by the judge on the 9th. It was held by Lord *Romilly*, M. R., upon a summons taken out by a person interested in the estate, that Mr. Wight stood in such a fiduciary position as disqualified him from becoming a purchaser of Lot 1, and directed it to be put up for sale at 6,110*l*., Mr. Wight to be the purchaser if no one bid more than that sum. "First," said his lordship, "I have to consider what was the position of Mr. Wight. He was the solicitor of certain creditors of Mr. Gibbons, and in that character was employed to take steps for the purpose of intervening in the suit, and having some management in the suit, for which purpose he obtained an order, though not until a day or two after the sale. That, however, was his character; he, therefore, was representing the creditors in the cause. The sale was clearly a sale on behalf of the persons interested in the

mortgage. It was for the purpose of *all* the creditors, therefore, and they were as much interested in its being a good sale, in order that there might be sufficient to pay them, as any other person; and Mr. Wight was their solicitor, and only their solicitor . . . . Mr. Wight applied to intervene in their behalf, and I consider that when his name was added as one of the solicitors for the vendor, he was to act on their behalf, and to make the sale as effective as it could be for them. That being his character, I do not think he was in a situation in which he was able to buy . . . . It was the duty of Mr. Wight to give all his assistance to obtaining the best possible price, and his name was put upon the list as one of the solicitors for that purpose . . . . Observe, what might in many cases be the effect of a bidding by a person in Mr. Wight's position. Upon seeing the person bid whose name was put on the particulars as one of the solicitors concerned in the sale, people might suppose that the property was bought in, and that it was not an effectual sale," 5 L. R. Ch. App. 553, 554 n. The decision of Lord *Romilly* was reversed by Lord Justice *Giffard* sitting alone, who was of opinion that the rule as laid down by Lord *Romilly* was not essential for the ends of justice, and not at all essential for the purpose of insuring a fair sale, but on the contrary, would tend to depreciate sales by the Court.

It appears, however, to be clear, that Lord *Romilly's* decision is in strict accordance with the principles laid down by Sir John *Leach* in *Grover* v. *Hugell*, 3 Russ. 428; by Lord *Cottenham* in *Re Bloye's Trusts*, 1 Mac. & G. 488; and by Lord *Langdale*, in *Greenlaw* v. *King*, 3 Beav. 49; viz. that where a person has put himself in such a position towards other parties, by which it becomes his duty to obtain the highest price for property in which they have an interest, he cannot be allowed by becoming a purchaser to put himself in a position antagonistic to the duties he has undertaken. The sub-mortgagee, Mr. Guest, appears to have been represented by Messrs. Caldicott & Canning, and they would, therefore, be only interested in obtaining from the sale sufficient to pay the sum due on the sub-mortgage (the amount of which is not stated in the report). The creditors, represented by Mr. Wight, as their solicitor, and after them Emily Gibbons, the personal representative of Mr. Benjamin Gibbons, were deeply interested in the sale being conducted in such a way as that it should produce more than sufficient to pay the amount of the sub-mortgage. Mr. Wight, solicitor for the creditors, clearly intervened for the purpose of protecting their interests, whereby

it became his duty, as observed by Lord *Romilly*, "to make the sale as effective as possible."

The very difficulty of ascertaining whether this was done or not, necessitates the strict application of the rule so well laid down by Lord *Romilly*—which if carried out as it ought to be, with unvarying strictness, would not, it is believed, have, as supposed by Lord Justice *Giffard*, a tendency to depreciate sales by the Court, but would prevent solicitors wishing to become purchasers of property, from putting themselves into positions in which their interests conflicted with their duties.

Where a surety gets rid of, and discharges an obligation, at a less sum than its full amount, he will not be allowed, as against his principal, to make himself a creditor for the whole amount, but only for the amount which he has actually paid in discharge of the common obligation: *Reed* v. *Norris*, 2 My. & Cr. 361, 375; *Ex parte Rushforth*, 10 Ves. 420; *Butcher* v. *Churchill*, 14 Ves. 567.

Executors or administrators will not be permitted, either immediately or by means of a trustee, to purchase for themselves any part of the assets, but will be considered as trustees for the persons interested in the estate, and must account to the utmost extent of the advantage made by them of the subject so purchased: *Hall* v. *Hallet*, 1 Cox, 134; *Killick* v. *Flexney*, 4 Bro. C. C. 161; *Watson* v. *Toone*, 6 Madd. 153; *Kilbee* v. *Sneyd*, 2 Moll. 186; *Baker* v. *Carter*, 1 Y. & C. Exch. Ca. 250; *Naylor* v. *Winch*, 1 S. & S. 566; *Cook* v. *Collingridge*, Jac. 607; *Wedderburn* v. *Wedderburn*, 4 My. & C. R. 41; *Baker* v. *Read*, 18 Beav. 398; *Smedley* v. *Varley*, 23 Beav. 358. Executors, moreover, cannot purchase a legacy from a legatee, and the fact that the legatee was also a co-executor will be no defence to the transaction. *In re Biel's Estate*, 16 L. R. Eq. 577. See also *Luff* v. *Lord*, 34 Beav. 220. So, if they compound debts or mortgages, or buy them in for less than is due upon them, they will not be allowed to retain any benefit from the transaction for themselves, but for the estate. See *Anon.* Salk. 155; *Ex parte James*, 8 Ves. 346; *Ex parte Lacey*, 6 Ves. 628.

In *Chute* v. *Lindesay*, 6 I. R. Eq. 385, cited, the defendant was an executor, whose testatrix had had an incumbrance affecting a property for sale by the Landed Estates Commissioners, and he purchased a portion of the property at the sale, at a price much below its real value, and obtained credit for the incumbrance vested in him as executor, in discharge of his purchase-money. He sought to retain the benefit of his purchase charging himself, in his account of the assets, with the sum realised by the sale. The peti-

tioner, Mr. Chute, was a legatee, under the will of the testatrix, and he filed a cause petition against the executor, insisting that his purchase was clothed with a trust for the legatees, and that they were entitled to have it declared part of the assets of the testatrix, and sold for the payment of the legacies, which the assets would have been otherwise insufficient to pay in full. The defendant insisted that the conveyance to him from the Commissioners was absolute, and that he was entitled to hold the lands for his own benefit, free from any personal equity or obligation. A decree was, however, made against him, declaring him a trustee of the lands for the legatees, and they were sold in that suit at a considerable advance of price.

Assignees of a bankrupt cannot in any case purchase his property. This may be laid down as a general rule, which will be more peculiarly applied with unrelenting jealousy, from the impossibility of reaching the transaction, and, moreover, because the assignee has the bankrupt and his property altogether under his own disposal; (see *Ex parte Chadwick*, cited in Montague and Ayrton's book on Bankruptcy, vol. 1, 329, 2nd ed.; *Ex parte Lacey*, 6 Ves. 623; *Ex parte Hughes*, 6 Ves. 617; *Ex parte James*, 8 Ves. 337; *Ex parte Tanner; Ex parte Attwood; Owen* v. *Foulkes*, 6 Ves. 430 n.; *Ex parte Bage*, 4 Madd. 459; *Ex parte Badcock*, 1 Mont. & Mac. 231; *Turner* v. *Trelawny*, 12 Sim. 49; *Ex parte Thwaites*, 1 M. & A. 323; *Ex parte Alexander*, 2 M. & A. 492); nor can his partner buy: (*Ex parte Burnell*, 7 Jur. 116); nor can even it seems a creditor of the bankrupt who has been consulted by the assignees as to the terms upon which the property should be put up: *Ex parte Hughes*, 6 Ves. 617. In *Whelpdale* v. *Cookson*, 1 Ves. 9, 5 Ves. 682, Lord *Hardwicke*, confirmed a sale of a bankrupt's estate to an assignee, in case the majority of the creditors should not dissent; but Lord *Eldon*, in *Ex parte Lacey*, 6 Ves. 628, doubted the authority of that case: "If," said his Lordship, the trustee is a trustee for all the creditors, he is a trustee for them all in the article of selling to others; and if the jealousy of the Court arises from the difficulty of a cestui que trust duly informing himself which is most or least for his advantage, I have considerable doubt whether the majority in that article can bind the minority:" *Ex parte Thwaites*, 1 M. & A. 323. But in a recent case, on payment of costs, a purchase by an assignee on being found beneficial by the Court was confirmed; (*Ex parte Gore*, 6 Jur. 1118; 3 M. D. & De G. 77; 7 Jur. 136); and an assignee has been removed by the Court in order that he might bid at a sale of the bankrupt's estate; (*Ex parte Perks*,

3 M. D. & De G. 385); and in a case where the Court refused to allow an assignee to bid, he was allowed to name the price he would give if the property were not sold by auction, and afterwards to buy at that price: *Ex parte Holyman*, 8 Jur. 156.

The Court of Chancery will rarely allow persons conducting a sale to bid at it. Thus, when those who are interested in an estate insist that a trustee ought not to be allowed to bid, the Court will give so much weight to their wishes, as to say, although the trustee may be also mortgagee, that until all other ways of selling be exhausted he shall not be allowed to buy. (*Tennant* v. *Trenchard*, 4 L. R. Ch. App. 547.) But if the Court is satisfied that no purchaser at an adequate price can be found, then it is not impossible that he may be allowed to make proposals and become a purchaser. (*Ib.*) So where a sale is directed by the Court of Chancery of partnership property upon a dissolution of partnership, liberty to bid at the sale will only be given to such of the partners as have not the conduct of the sale: *Wild* v. *Milne*, 26 Beav. 506.

As to the purchase of debts due from the bankrupt by the assignee, it has been decided that, as assignees cannot buy the estate of the bankrupt, so, also, they cannot for their own benefit buy an interest in the bankrupt's estate, because they are trustees for the creditors. In that respect there is no difference between assignees and executors, who cannot for their own benefit buy the debts of the creditors; for although, in a moral point of view, such a transaction may not be blamable, still the Court, considering that, unless the policy of the law made it impossible for them to do anything for their own benefit, it was impossible to see in what cases the transaction was morally right, and also the prodigious power of the assignees connected with solicitors under the commission, and bankers receiving the money, over the creditors and the bankrupt, has held the assignees trustees of the debts purchased by them for the benefit of those entitled to the interest in the residue, the creditors or the bankrupt, as the case may be: *Ex parte Lacey*, 6 Ves. 628. And see *Pooley* v. *Quilter*, 2 De G. & Jo. 327, reversing the decree of Sir *R. T. Kindersley*, V.-C., reported 4 Drew. 184; and see *Adams* v. *Sworder*, 2 De G. Jo. & Sm. 44, reversing *S. C.*, 4 Giff. 287.

Solicitors to the commission (*Owen* v. *Foulkes*, 6 Ves. 630; *Ex parte Linwood*, cited 8 Ves. 343; *Ex parte Town*, 2 M. & A. 29), or solicitors having conduct of a sale under a decree of the Court of Chancery (*Sidney* v. *Ranger*, 12 Sim. 118), cannot purchase.

The rule affecting assignees of bankrupts applied with equal force to a commissioner of bankrupts: (*Ex parte Bennett*, 10 Ves. 381), even although he had not acted; (*Ex parte Harrison*, 1 Buck, 17; *Ex parte Dumbell*, Mont. 33, cited in notes); or had ceased to act in the prosecution of the fiat; *Ex parte Baynton*, 7 Jur. 244.

The Courts of Bankruptcy having jurisdiction over trustees of deeds executed in conformity with section 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), repealed by 32 & 33 Vict. c. 83, the Court of Chancery, although its jurisdiction was not excluded by the former act, has refused to exercise it, except where the Court of Bankruptcy was unable to give adequate relief. See *Stone* v. *Thomas*, 5 L. Rep. Ch. App. 219; there a creditor filed a bill in Chancery against the trustees of a creditor's deed, alleging that one of the trustees had purchased some of the property at an undervalue, and praying that the sale might be set aside: it was held by Lord *Hatherley*, L. C., that as there was nothing in the case which would render the relief in Chancery more effectual than in bankruptcy, the bill must be dismissed. See also *Martin* v. *Powning*, 4 L. R. Ch. App. 356.

A solicitor is not incapable of contracting with or purchasing from his client; but inasmuch as the parties stand in a relation which gives, or may give, the solicitor an advantage over the client, the onus lies on the solicitor to prove that the transaction was fair: *Montesquieu* v. *Sandys*, 18 Ves. 302; *Cane* v. *Lord Allen*, 2 Dow. 289; *Champion* v. *Rigby*, 1 Russ. & M. 839; *Edwards* v. *Meyrick*, 2 Hare, 60; *Gibbs* v. *Daniel*, 4 Giff. 1; *Pisani* v. *Attorney-General for Gibraltar*, 5 L. R. P. C. C. 516; and the usual indorsement or acknowledgment in the deed of the receipt of the purchase-money will not be sufficient evidence of its payment by the solicitor to his client: *Gresley* v. *Mousley*, 3 De G. F. & Jo. 433. In the case of *Gibson* v. *Jeyes*, 6 Ves. 266, where Jeyes, an attorney, sold an annuity to his client, this subject was much considered by Lord *Eldon:* "An attorney," says his Lordship, "buying from his client, can never support it, unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger. That must be the rule. If it appears that in that bargain he has got an advantage by his diligence being surprised, putting fraud and incapacity out of the question, which advantage, with due diligence, he would have prevented another person from getting, a contract under such circumstances shall not stand. The principle so stated may bear hard in a particular case; but I must lay down a general principle that will

apply to all cases; and I know of none short of that, if the attorney of the vendor is to be admitted to bargain for his own interest, where it is his duty to advise the vendor against himself." And in another part of his judgment his Lordship observes, "If he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest that he has given his client all that reasonable advice against himself that he would have given against a third person. It is asked, where is that rule to be found? I answer, in that great rule of the Court, that he who bargains in matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else." See also *Austin* v. *Chambers*, 6 C. & F. 1, 37; *Trevelyan* v. *Charter*, 9 Beav. 140; *S. C.*, 11 C. & F. 714; *King* v. *Savery*, 1 Sm. & G. 271; *S. C.*, nom. *Savery* v. *King*, 5 H. L. Cas. 627, 656, 665; *Bellamy* v. *Sabine*, 2 Ph. 425; *Holman* v. *Loynes*, 4 De G. Mac. & G. 270; *Salmon* v. *Cutts*, *Cutts* v. *Salmon*, 4 De G. & Sm. 125; *Barnard* v. *Hunter*, 2 Jur. N. S. 1213; *Waters* v. *Thorn*, 22 Beav. 547; *Spencer* v. *Topham*, *Ib.* 573; *Denton* v. *Donner*, 23 Beav. 285; *Pearson* v. *Newson*, 28 Beav. 598; *Popham* v. *Exham*, 10 Ir. Ch. Rep. 440; *Gresley* v. *Mousley*, 1 Giff. 450, 4 De G. & Jo. 78; 3 De G. F. & Jo. 433; *Beale* v. *Billing*, 13 Ir. Ch. Rep. 250.

It seems, in fact, that a solicitor, purchasing from his client, ought to insist upon the intervention of another professional man to act on behalf of his client: *Pisani* v. *Attorney-General for Gibraltar*, 5 L. R. Ho. Lo. 516.

But the rule laid down by Lord *Eldon* will not apply, if the solicitor does not act in such capacity in hac re: (*Cane* v. *Lord Allen*, 2 Dow. 289; *Edwards* v. *Meyrick*, 2 Hare, 68; but see *Edwards* v. *Williams*, 11 W. R. (L. J.), 561; unless it appears that he is aware, or takes advantage, of a neglect of duty on the part of the new solicitor, or he withholds or suppresses any information of importance acquired when he acted as solicitor: *Gibbs* v. *Daniel*, 4 Giff. 1. In *Montesquieu* v. *Sandys*, 18 Ves. 302, the purchase of a reversionary interest, viz. a second presentation to a living, after the death of the then incumbent, by an attorney, from his client, though advantageous in the end, was sustained, no fraud or misrepresentation being proved, and the proposal coming from the client, both the attorney and client being ignorant of the real value. See *Hesse* v. *Briant*, 6 De G. Mac. & G. 623; 2 Jur. N. S. 922.

A solicitor, if a purchase from his client be a fair transaction, may file a bill for specific performance (*Cane* v. *Lord Allen*, 2 Dow, 289). And if a solicitor purchasing from

his client institute a suit against third parties to enforce his right, the objection to the transaction on the ground of its being a purchase by a solicitor from his client, cannot be maintained by such third parties: *Knight* v. *Bowyer*, 23 Beav. 609.

Although a person may have ceased to act as attorney for another, if by means of former transactions, while holding that character, he had acquired, at the expense of his client, a knowledge of the value of his property which the client had not, he will not be able to sustain any contract relative to such property, if he concealed from his former client the knowledge so obtained: *Cane* v. *Lord Allen*, 2 Dow, 294; *Montesquieu* v. *Sandys*, 18 Ves. 308; *Ex parte James*, 8 Ves. 352. If, however, such knowledge were communicated to the former client by the attorney, the parties would be placed upon an equality, and such communication being proved, the difficulty, quoad hoc, would be removed: *Edwards* v. *Meyrick*, 2 Hare, 69.

Although a beneficial purchase by a solicitor from his client pending that relation cannot be supported, the solicitor may insist on and obtain a mortgage from his client for what is justly due to him: *Johnson* v. *Fesenmeyer*, 25 Beav. 88; 3 De G. & Jo. 13; *Pearson* v. *Newson*, 28 Beav. 598.

The employment of counsel as confidential legal adviser disables him from purchasing for his own benefit charges on his client's estates, without his permission; and although the confidential employment ceases, the disability continues as long as the reasons on which it is founded continue to operate. Thus in *Carter* v. *Palmer*, 1 Dru. & Walsh, 722, 8 C. & F. 657, C., a barrister who had been for several years confidential and advising counsel to P., and had by reason of that relation acquired an intimate knowledge of his property and liabilities, and was particularly consulted as to a compromise of securities given by P. for a debt which C. considered not to be recoverable to the full amount, purchased those securities for less than their nominal amount, without notice to P.; it was held by Lord *Plunket*, and by the House of Lords on appeal, that C.'s purchase, while the compromise proposed by P. was feasible, was in trust for P.; and that C. was entitled only to the sum he had paid, with interest. "The several cases," observes Lord *Cottenham* (8 C. & F. 707), "which have occurred in which solicitors have been restrained from acting against their former clients, or communicating information acquired in such employment, proceed upon a principle which governs this case; for it cannot be contended that they are at liberty to use for their own benefit, and to the prejudice of their former

clients, information acquired whilst acting for them, which they are not permitted to communicate or to use for the benefit of others. I am therefore of opinion that Mr. C. had been incapacitated by the character of his employment from purchasing, for his own benefit, these securities upon his employer's property, and that such incapacity continued at the time of his purchase, and consequently that he is to be considered as having so purchased for the benefit of his former employer."

In *Greenfield* v. *Bates*, 5 Ir. Ch. Rep. 219, a solicitor purchased a leasehold interest from his client, and himself prepared the assignment, which contained no covenant to indemnify the vendor, but did contain the words, "subject to rent and covenants," in the lease. It was held by Lord Chancellor *Brady* that the executor of the solicitor was bound to indemnify the vendor against the rent and covenants.

So in *Hobday* v. *Peters*, 28 Beav. 349, a mortgagor consulted a solicitor who turned her over to his clerk to assist her gratuitously. The clerk, by reason of information derived during such employment, bought up the mortgage for less than half the amount. It was held by Sir *John Romilly*, M. R., that he was a trustee of the benefit for the mortgagor.

A person chosen as arbitrator cannot buy up the unascertained claims of any of the parties to the reference; for, to use the words of Lord *Manners*, "that he should purchase an interest in those rights upon which he was to adjudicate, could not be endured. It would indeed be to corrupt the fountain, and contaminate the award:" *Blennerhassett* v. *Day*, 2 Ball & B. 116.

Upon the same principle a judgment delivered by a judge, who has an interest in the subject-matter of the suit, will be set aside. See *Dimes* v. *Proprietors of the Grand Junction Canal* (3 H. L. Cas. 759); there it was held that a judgment of Lord *Cottenham*, C., assisted by Lord *Langdale*, M. R. (2 Mac. & G. 285), in which, affirming the decision of the Court below, he had decided in favour of a company in which he was a shareholder to the amount of several thousand pounds, ought to be reversed. "No one," said Lord *Campbell*, "can suppose that Lord *Cottenham* could be in the remotest degree influenced by the interest he had in this concern; but it is of the last importance that the maxim that no man is to be a judge in his own cause, should be held sacred. . . . This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

So, where an Act of Parliament

empowered a rector, with the consent of the bishop, who was patron of the living, to raise money by annuity for building a new rectory-house, the plan and accounts of which were to be approved of by the bishop. The bishop advanced the necessary money, and obtained a grant of the annuity charged on the living. The bishop being placed in the position of a trustee to protect the interests of the rectory, it was held, by Lord *Langdale*, M. R., that he could not become the purchaser of the annuity; and that the transaction, although there was no unfairness in it, could not stand, because it was a clear violation of those rules which have been established for the defence of those whose interests and property have been committed to the protection of persons placed in a fiduciary situation: *Greenlaw* v. *King*, 3 Beav. 49. See also *Grover* v. *Hugell*, 3 Russ. 428. But see *Boyd* v. *Barker*, 4 Drew. 582.

It may, however, be laid down as a general rule that a tenant for life may purchase or take in exchange lands from trustees, in whom they are vested with a power of sale and exchange, with his consent and direction (*Howard* v. *Ducane*, 1 T. & R. 81), but this case has been put entirely upon the practice of conveyancers (*Grover* v. *Hugell*, 3 Russ. 432); though probably it might be better rested upon the principle that as the trustees were the vendors, their intervention to check and control the transaction, was quite sufficient to take the case out of the operation of the rule preventing a person in a fiduciary position from purchasing from himself. See *Beaden* v. *King*, 9 Hare, 499.

In a recent case, Lord Justice *James* says, that "the ground of the rule is, that the power of consenting to or requesting an exercise of a power of sale, is given to the tenant for life for his own benefit, and that he is not in a fiduciary position as to it. He has, therefore, the same right to buy from the trustees that any one else has." *Dicconson* v. *Talbot*, 6 L. R. Ch. App. 32, 37.

A tenant for life, with power to lease, might at law grant a lease to a trustee for himself (*Wilson* v. *Sewell*, 4 Burr. 975; *Taylor* v. *Horde*, 1 Burr. 124; *Lord Cardigan* v. *Montague*, 2 Sugd. Pow., 7th ed., App., p. 551); so likewise where, under a mortgage, power was reserved to the mortgagor until entry by the mortgagee to grant building leases, it was held by Sir *W. Page Wood*, V.-C., that a lease to a trustee for the mortgagor was good: *Bevan* v. *Habgood*, 1 J. & H. 222.

A power of sale given without restriction to a party having a limited interest only, may well be held to impart a negative upon the power of the same party to buy, for the power to sell is in

the nature of a trust; but as the rule does not extend to prevent, in all cases, a party having a power to sell from becoming a purchaser; so neither, where there is a restriction upon the power of sale, is the party having the power to sell in all cases at liberty to become the purchaser. It must, in each case, depend upon the circumstances under which, and the purposes for which, the power was given, and upon the nature and extent of the restrictions which are put upon the exercise of the power. In the proportion in which the power is restricted, the danger incident to allowing the donee to purchase is diminished: per Sir *G. Turner*, V.-C., in *Beaden* v. *King*, 9 Hare, 519.

In the absence of any indication of intention by the settlor or testator, which must be attended to (*In re Tempest*, 1 L. R. Ch. App. 485), there is no impropriety or conflict of interest, as regards the time for sale or the necessity for a sale, between the position of tenant for life and the position of other parties claiming under a settlement or will. Hence, when a tenant for life under a will was appointed one of the trustees, and as surviving trustee sold the property, it was held by Sir *George Jessel*, M. R., that he could make a good title to the property which the Court would enforce upon a purchaser: *Forster* v. *Abraham*, 17 L. R. Eq. 351.

A creditor taking out execution is not precluded from becoming the purchaser of the property seized under it. "The case of trustees," observed Sir *Thomas Plumer*, M. R., "is quite different; with respect to them, the principle is, that the same person shall not be buyer and seller; but here the sheriff is the seller:" *Stratford* v. *Twynam*, Jac. 421; and it has been held that a mere creditor, having his debt secured by an agreement from the debtor to convey an estate upon trust for the creditor to sell, and amongst others to pay his own debt, is not in such a fiduciary position as to be disabled from purchasing the estate from the agent of his debtor: *Chambers* v. *Waters*, 3 Sim. 42; Coop. Cas. temp. Brougham, 91; *S. C.*, nom. *Waters* v. *Groom*, 11 C. & F. 684.

With regard to transactions between guardian and ward, Lord *Hardwicke* observed, in *Oldin* v. *Samborn*, 2 Atk. 15, that it was improper for a guardian to purchase his ward's estate immediately upon his coming of age. But although it has a suspicious look, yet if he be paid the full consideration, it is not voluntary, and cannot be set aside. See *Hylton* v. *Hylton*, 2 Ves. 549. In *Carey* v. *Carey*, 2 S. & L. 173, leaseholds belonging to an infant were sold under a decree of the Court, and purchased by his guardian in the suit, who acted also as receiver. The sale was set aside, although the full value was given, and de-

creed fraudulent and void, it being wholly unnecessary, as there were funds sufficient for the purposes to which the purchase-money was to be applied; and the old lease having been surrendered, and a new one obtained, it was declared to be held in trust for the persons entitled to the former lease. See also *Dawson* v. *Massey*, 2 Ball & B. 219. And Lord *St. Leonards* says, with reference to Lord *Hardwicke's* observation in *Oldin* v. *Samborn*, that "it seems clear that such a purchase would now be set aside on general principles, without reference to the adequacy of consideration." Sugd. V. & P. 692, 14th ed.

In a recent case, a young lady, two years after she came of age, granted a mining lease as to part of the property in possession, and as to the rest in reversion, to her brother-in-law and uncle, at the suggestion and advice of her father's executor, and with no independent advice. Three months afterwards the executor was taken into partnership with the lessees. It appeared that applications of other persons to become lessees had been discountenanced, and concealed from the knowledge of the lady. It was held by Sir *John Romilly*, M. R., that, in order to support the lease in equity, the lessees were bound to show that no better terms could have been obtained; that the grantor had the fullest information on the subject; that she had separate, independent, and disinterested advice; and that she had deliberately and intentionally made the grant; and, the lessees having failed in proving this, the lease was cancelled: *Grosvenor* v. *Sherratt*, 28 Beav. 659; *Mulhallen* v. *Marum*, 3 Dru. & W. 317; *Archer* v. *Hudson*, 7 Beav. 560. See also *Low* v. *Holmes*, 8 Ir. Ch. Rep. 53.

If a guardian buys up incumbrances upon his ward's estate at an under-value, he will be held a trustee for his ward, and can only charge him with what he has actually paid: *Henley* v. ——, 2 Ch. Ca. 245.

The principle of these cases has been acted upon by the Legislature, which, under the General Inclosure Act (41 Geo. 3, c. 109, s. 2), has rendered commissioners incapable of purchasing *any* estate in the parish in which an inclosure is made until five years after the date and execution of the award. And under the Commons Inclosure Act (8 & 9 Vict. c. 118, s. 219), a similar prohibition prevents valuers from purchasing land until after seven years from the confirmation of the award.

So also in Joint Stock Companies Act (7 & 8 Vict. c. 110), the 29th section of which enacts that if any contract or dealing (with certain exceptions) shall be entered into in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the share-

holders to be summoned for that purpose, and that no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting. "The object of the clause," observes *Wood*, V.-C., "is to prevent a person, who is a trustee, from entering into contracts on behalf of his cestuis que trust in which he is himself personally interested. The exception to the prohibition introduced by the words, 'no such contract shall have force until approved and confirmed,' is intended to afford an opportunity to the cestui que trust to consider whether he will ratify any such contract." *Re South Essex Gas, &c. Co.*, Johns. 483. See *Ernest* v. *Nicholls*, 6 Ho. Lo. Ca. 401; *Murray's Executors' Case*, 5 De G. Mac. & G. 746. A contract between a company and a person who acts as a director, whether legally or not, is within the prohibition of the statute: *Re South Essex Gas, &c. Co.* Johns. 480. The exception in the 29th section of the statute, of contracts for articles or services the subject of the proper business of the company, refers to articles and services supplied or rendered by the company to a director, and not to those supplied by a director to the company. *Ib.*

The Joint Stock Companies Act (7 & 8 Vict. c. 100) has been repealed by the Companies Act, 1862 (25 & 26 Vict. c. 89), which has no section corresponding with the 29th section of 7 & 8 Vict. c. 100, but amongst the regulations contained in the 1st schedule thereof it is enacted that "the office of director shall be vacated if he holds any other office or place of profit under the company. . . . . If he is concerned in or participates in the profits of any contract with the company. But the above rules are subject to the following exception: that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with or done any work for the company of which he is a director; nevertheless, he shall not vote in respect of any such contract or work; and if he does so vote, his vote shall not be counted. Sect. 57.

Although there be no particular relation between the parties such as that of trustee and cestui que trust, principal and agent, solicitor and client, if there exist a confidence between them, of such a character as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him, the Court will not allow any transaction between the parties to stand unless there have been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him. See *Tate* v. *Williamson*, 2 L. R. Ch. App.

55. There Tate, a young man aged twenty-three, entitled to a moiety of a freehold estate, the entirety of which brought in about 440*l.* a year, being pressed for payment of his college debts, amounting to about 1000*l.*, and being estranged from his father, wrote to his great uncle for advice and assistance as to the payment of the debts. The uncle deputed the defendant, his nephew, to see Tate on the subject. The defendant met Tate by appointment, and at this interview Tate refused to allow any attempt to compromise the debts, and said he would sell his moiety of the estate, upon which the defendant offered him 7000*l.* for it, payable by instalments. Tate, next day, accepted the offer. Before an agreement had been signed, the defendant obtained a valuation by a surveyor, estimating the value of the mines under the entirety at 20,000*l.* The sale was completed without this valuation having ever been communicated to Tate. Tate's heir filed a bill to impeach the sale, and it was held by Lord *Chelmsford*, C., affirming the decision of Sir *W. Page Wood*, V.-C. (reported 1 Law Rep. Eq. 528), that the defendant had stood in a fiduciary relation to Tate, that made it his duty to communicate to him all material information which he acquired affecting the value of the property; and that as he had not communicated the valuation to Tate, the transaction must be set aside. See also *Hobday* v. *Peters*, 28 Beav. 349.

There is not much authority upon the question, how far relatives of a trustee can deal with him in respect of the trust property. In *Ferraby* v. *Hobson*, 2 Ph. 255, 261, a lease to a sister of one of two trustees was held good, where the facts which appeared in evidence completely removed all suspicion. Lord *Cottenham*, however, in his judgment, said, "that trustees expose themselves to great peril in allowing their own relatives to intervene in any matter connected with the execution of the trust; for the suspicion which that circumstance is calculated to excite, where there is any other fact to confirm it, is one which it would require a very strong case to remove. See *Coles* v. *Trecothick*, 9 Ves. 234; *Ex parte Skinner*, 2 Mer. 453, 457.

It may here be mentioned that where no fiduciary relation exists between the parties, in the absence of fraud, mere inadequacy of consideration, although the vendor may have no professional adviser, will not be a sufficient reason for setting aside a sale: (*Harrison* v. *Guest*, 6 De G. Mac. & G. 424, 8 Ho. Lo. Ca. 481); but inadequacy of price, the want of due protection and advice, precipitation in concluding and carrying out the bargain, especially when the vendor is poor and illiterate, may be held to be sufficient evidence of fraud on the part of the pur-

chaser, so as to enable the vendor or his heir to set aside the sale. *Longmate* v. *Ledger*, 2 Giff. 157; *Clark* v. *Malpas*, 31 Beav. 80, 10 W. R. (L. J.) 677; *Douglas* v. *Culverwell*, 10 W. R. (V. C. S.) 189; *Baker* v. *Monk*, 33 Beav. 419; and see *Clarkson* v. *Hanway*, 2 P. Wms. 202; *Prees* v. *Coke*, 6 L. R. Ch. App. 645.

Where a person standing in a fiduciary position purchases at a sale, which takes place by order of the Court, although such sale has been absolutely confirmed, the Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48, s. 7) will not be a bar to its being set aside. *Guest* v. *Smythe*, 5 L. R. Ch. App. 551. See also *Delves* v. *Delves*, 20 L. R. Eq. 77.

Nature of Relief granted by Courts of Equity.]—It remains to consider the nature of the relief a Court of equity will grant against a trustee or other person who has made a purchase which is improper, according to the rules before laid down, and upon what terms that relief will be granted.

Any of the cestuis que trust (under which term are comprehended the persons entitled to the property before the sale, or their representatives), if they wish it, can insist upon a reconveyance of the property from the trustee who purchased, if it remains in his hands unsold; (*York Buildings Company* v. *Mackenzie*, 8 Bro. P. C. 42, Toml. ed.; *Lord Hardwicke* v. *Vernon*, 4 Ves. 411; *Randall* v. *Errington*, 10 Ves. 423; *Hamilton* v. *Wright*, 9 C. & F. 123); or from a person who has purchased from him, with notice: *Attorney-General* v. *Lord Dudley*, Coop. 146; *Dunbar* v. *Tredennick*, 2 Ball & B. 304; *Pearson* v. *Benson*, 28 Beav. 598. But the reconveyance will only be decreed upon the terms of their repaying the purchase-money, with interest at 4*l.* per cent., and all sums which may have been expended in repairs and improvements of a permanent and lasting nature, and also such as have a tendency to bring the estate to a better sale. On the other hand, there must be an allowance for acts that deteriorate the value of the estate, and the trustee must account for all rents received by him, and for all profits, such as money arising from the sale of timber; and he must also pay an occupation rent for such part of the estate as may have been in his actual possession: *Hall* v. *Hallet*, 1 Cox, 134; *Ex parte Hughes*, 6 Ves. 624, 625; *Campbell* v. *Walker*, 5 Ves. 682; *Ex parte Bennett*, 10 Ves. 400, 401; *Robinson* v. *Ridley*, 6 Madd. 2; *Ex parte James*, 8 Ves. 351; *Ex parte Lacey*, 6 Ves. 630; *Watson* v. *Toone*, 6 Madd. 153; *York Buildings Company* v. *Mackenzie*, 8 Bro. P. C. 42, Toml. ed.; *Mill* v. *Hill*, 3 H. L. Cas. 869; and see *Popham* v. *Exham*, 10 Ir. Ch. Rep. 440, and the form of decree given. In estimating improvements, old

buildings, if incapable of repair, should be valued as old materials, but otherwise as buildings standing: *Robinson* v. *Ridley*, 6 Madd. 2.

When, however, the sale has been set aside for *actual* fraud, no allowance will, ordinarily, be made for money laid out in improving the estate (*Kenney* v. *Browne*, 3 Ridg. 518; *Stratton* v. *Murphy*, 1 Ir. Rep. Eq. 361; but see *Oliver* v. *Court*, 8 Price, 172), but an allowance will be made for necessary repairs: *Baugh* v. *Price*, 1 G. Wils. 320.

Although the purchaser has paid the purchase-money into Court, and it has been invested in the funds, he will not be entitled to any benefit from any advance in the funds, but to his purchase-money and interest only; for, if the stock had fallen, instead of advancing, he could not have been compelled to take it: *Ex parte James*, 8 Ves. 351.

It seems that where a reconveyance by the purchaser is directed, it must, unless a lien be given to him for the balance on taking the accounts, be made at once before the accounts are taken (*Trevelyan* v. *Charter*, 9 Beav. 140), and a solicitor, a sale to whom from his clients was set aside, has been compelled to produce his title-deeds before payment: *Shallcross* v. *Wearer*, 12 Beav. 272; 2 Hall & T. 231.

In a great case upon an appeal from the Court of Session in Scotland (*York Buildings Company* v. *Mackenzie*, 8 Bro. P. C. 42 Toml. ed.), the reconveyance was ordered, without prejudice to the titles and interests of the lessees and others who might have contracted with the defendant *bonâ fide*, and before the commencement of the suit. Lord *St. Leonards*, apparently thinking that this part of the decree infringed upon the doctrine that purchasers from the defendant (including lessees), who took with notice, ought to be equally liable to have their transactions with him set aside, accounts for the exception in their favour, upon two grounds: the one, that no notice was charged on the lessees, nor were the leases attempted to be impeached; moreover, that the relief sought had been delayed for many years; and that the point established by the House of Lords was, to say the least, a new doctrine with reference to Scotland: 3 Sug. V. & P. 243, 10th ed.

It must, however, be observed, that the exception in the decree was only in favour of lessees and others who had contracted *bonâ fide*, words which would, it seems, be sufficient to exclude lessees and others who had taken with notice of the equity which the plaintiffs had against the defendant, although, as they were not parties to the suit, it would have been necessary to have taken proceedings against them, alleging

and proving notice, in order to set aside the leases granted to them by the defendant.

If the cestui que trust does not wish for a reconveyance of the property, an order will be made, that the expense of repairs and improvements not only substantial and lasting, but such as have a tendency to bring the estate to a better sale, after making an allowance for acts that deteriorate the value of the estate, shall be added to the purchase-money, and that the estate shall be put up at the accumulated sum; if any one makes an advance upon that sum, the trustee shall not have the estate; if no one does, he will be held to his purchase; (*Ex parte Reynolds*, 5 Ves. 707; *Ex parte Hughes; Ex parte Lacey; Lister* v. *Lister*, 6 Ves. 617, 625, 631; *Ex parte Bennett*, 10 Ves. 281; *Ex parte Hewitt*, 2 Mont. & Ayr. 477; *Stepney* v. *Biddulph*, 13 W. R. (V.-C. W.) 576; *Tennant* v. *Trenchard*, 4 L. R. Ch. App. 546); but where the trustee has bought the estate in one lot, and the cestuis que trust are desirous of having it sold in several lots, the cestuis que trust must first repay him all the money he has advanced, with interest, he accounting for the rents received by him, or paying an occupation rent, if he actually occupied the estate: *Ex parte James*, 8 Ves. 351.

Where the trustee has *resold* the estate, the cestui que trust can, as in the principal case, make him account for what he has received over and above the purchase-money he himself paid, with interest at 4*l.* per cent.: *Ex parte Reynolds*, 5 Ves. 707; *Hall* v. *Hallet*, 1 Cox, 134.

The costs of the suit, where the sale is set aside, must be paid by the trustee; (*Sanderson* v. *Walker*, 13 Ves. 601; *Hall* v. *Hallet*, 1 Cox, 141; *Whichcote* v. *Lawrence*, 3 Ves. 740; *Dunbar* v. *Tredennick*, 2 Ball & B. 304: see, however, *Baker* v. *Carter*, 1 Y. & C. Exch. Ca. 250; *Downes* v. *Grazebrook*, 3 Mer. 209); unless there has been great delay on the part of the cestui que trust: *Attorney-General* v. *Lord Dudley*, Coop. 146. And even if the cestui que trust fails to set aside the sale, on account of his own delay, the Court may refuse the trustee his costs: *Gregory* v. *Gregory*, Coop. 201; *Champion* v. *Rigby*, 1 Russ. & My. 539. As to costs, when a trustee is accused of actual fraud not made out, see *Parker* v. *Mackenna*, 10 L. R. Ch. App. 96, 129.

Acquiescence.]—A cestui que trust who wishes to set aside a purchase by a trustee must apply within a reasonable period (*Campbell* v. *Walker*, 5 Ves. 680, 682), which is in general less than the time allowed by the Statute of Limitations (*Morse* v. *Royal*, 12 Ves. 374), and depends upon the circumstances of each particular case.

Thus mere lapse of time for a

long period, which will of itself be evidence of acquiescence, in an improper transaction, will disable a person from coming into a Court of equity to set it aside: (*Morse* v. *Royal*, 12 Ves. 355; *Price* v. *Byrne*, cited with approbation by Lord *Alvanley* in *Campbell* v. *Walker*, 5 Ves. 631; *Champion* v. *Rigby*, 1 Russ. & My. 539; *Roberts* v. *Tunstall*, 4 Hare, 257; *Beaden* v. *King*, 9 Hare, 499, 532; *Baker* v. *Read*, 18 Beav. 398; *Marquis of Clanricarde* v. *Henning*, 30 Beav. 175; *Wentworth* v. *Lloyd*, 32 Beav. 467; Aff. Dom. Proc. 10 Jur. N. S. 961; *In re M'Kenna's Estate*, 13 Ir. Ch. Rep. 239; *Barwell* v. *Barwell*, 34 Beav. 371; and see *Seagram* v. *Knight*, 3 L. R. Eq. 398, varied on appeal, 2 L. R. Ch. App. 628). For long acquiescence under a sale to a trustee, ought to be taken as evidence, that as between the trustee and cestui que trust, the relation had been abandoned in the transaction; and that in all other respects it was fair: per Lord *Eldon*, C., in *Parkes* v. *White*, 11 Ves. 226.

Where there are other circumstances, showing acquiescence beyond the mere lapse of time, a delay for a shorter period will be a bar to relief: *Wright* v. *Vanderplank*, 2 K. & J. 1; *Baker* v. *Bradley*, 7 De G. Mac. & G. 597.

It has been laid down by an eminent judge that "to fix acquiescence upon a party, it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded, and to which it refers," per Sir *William Grant*, M. R., in *Randall* v. *Errington*, 10 Ves. 428: see also, *Chalmer* v. *Bradley*, 1 J. & W. 51; *Trevelyan* v. *Charter*, 9 Beav. 140; *S. C.*, 11 C. & F. 714; 4 L. J. (N. S.) Ch. 209; *Savery* v. *King*, 5 H. L. Cas. 624, 667. It seems, however, that there may be cases in which, from the great lapse of time, the knowledge of such facts ought to be presumed: *Life Association of Scotland* v. *Siddal*, 3 De G. F. & Jo. 58; and see and consider *Knight* v. *Majoribanks*, 11 Beav. 322, 2 Mac. & G. 10; and the distress of the cestui que trust may be an excuse for acquiescence; (*Gregory* v. *Gregory*, Coop. 201; *Roche* v. *O'Brien*, 1 Ball & B. 342; *Gresley* v. *Mousley*, 4 De G. & Jo. 78, 98, sed vide *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58); but it has been held that laches does not in an equal degree apply to a body of creditors, to whom relief will be granted when it would be refused to an individual: see case in the Exchequer, cited 6 Ves. 632; *Whichcote* v. *Lawrence*, 3 Ves. 740; *York Buildings Company* v. *Mackenzie*, 8 Bro. P. C. 42, Toml. ed.

But even creditors have been refused relief when their laches has been gross; as for instance,

where they acquiesced in a sale for thirty-three years: *Hercy* v. *Dinwoody*, 2 Ves. Jun. 87.

And in considering lapse of time it only commences to run from the discovery of the circumstances giving the title to relief. (*Trevelyan* v. *Charter*, 9 Beav. 140; 11 C. & F. 714; 4 L. J. (N. S.) Ch. 209; *The Marquis of Clanricarde* v. *Henning*, 30 Beav. 175; *Vane* v. *Vane*, 8 L. R. Ch. App. 383;) and against a person under disability from the time they become sui juris (*Campbell* v. *Walker*, 5 Ves. 678, 682; *Randall* v. *Errington*, 10 Ves. 427; *Morse* v. *Royal*, 12 Ves. 373). But femes covert are considered as femes sole with regard to property settled to their separate use, unless it be so settled without power of anticipation. See *Hulme* v. *Tenant*, and note, post. Nor will time in general run against a party so long as his interest is contingent or reversionary (*Gowland* v. *De Faria*, 17 Ves. 20; *Bennett* v. *Colley*, 5 Sim. 191; *Duke of Leeds* v. *Lord Amherst*, 2 Ph. 117; *Browne* v. *Cross*, 14 Beav. 105; *Hope* v. *Liddell*, 21 Beav. 183; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & Jo. 58, 7 Jur. N. S. 785; *Bowen* v. *Evans*, 1 Jo. & L. 178), or dependent on the will of the trustee making the purchase (*Roberts* v. *Tunstall*, 4 Hare, 257), but the fact of the interest being reversionary does not prevent the party interested assenting to a breach of trust: *Life Association of Scotland* v. *Siddal*, 3 De G. F. & Jo. 58.

Although acquiescence in an improper sale may have the effect of not enabling a party to set it aside, it nevertheless will not be sufficient to induce a Court of equity to exercise its discretionary power of compelling specific performance of the agreement to sell: *Salmon* v. *Cutts*, *Cutts* v. *Salmon*, 4 De G. & Sm. 125.

Where a bill to set aside a purchase by a solicitor from his client is dismissed on the ground of lapse of time, the Court gives the solicitor no costs unless he proves the fairness of the transaction: *The Marquis of Clanricarde* v. *Henning*, 30 Beav. 175.

Confirmation.]—A cestui que trust, if sui juris (*Campbell* v. *Walker*, 5 Ves. 678, 682) may confirm an invalid sale, so that he cannot afterwards set it aside: *Morse* v. *Palmer*, 12 Ves. 353; *Roche* v. *O'Brien*, 1 Ball & B. 353; *Dover* v. *Buck*, 5 Giff. 57. And a feme covert as to property settled to her separate use without any fetter upon anticipation, has the same power as a feme sole: *Hulme* v. *Tenant*, and note, post; and as to real property not so settled, she can by deed executed under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), confirm such sale. But in order to constitute a valid confirmation, a person must be aware that the act he is doing will have

the effect of confirming an impeachable transaction: *Murray* v. *Palmer*, 2 S. & L. 486; *Dunbar* v. *Tredennick*, 2 Ball & B. 317; *Malony* v. *L'Estrange*, 1 Beat. 413; *Adams* v. *Clifton*, 1 Russ. 297; *Cockerell* v. *Cholmeley*, 1 Russ. & My. 425; *Chalmer* v. *Bradley*, 1 J. W. 51; *De Montmorency* v. *Devereux*, 7 C. & F. 188; *Salmon* v. *Cutts*, 4 De G. & Sm. 129; *Stump* v. *Gaby*, 2 De Gex, Mac. & G. 623; *Waters* v. *Thorn*, 22 Beav. 547; *Lloyd* v. *Attwood*, 3 De G. & Jo. 650; and see *Lyddon* v. *Moss*, 4 De G. & Jo. 104; *Kempson* v. *Ashbee*, 10 L. R. Ch. App. 15. Nor will the act of confirmation be valid, if it be done in distress and difficulties, under the force, pressure, and influence of the former transaction (*Crowe* v. *Ballard*, 3 Bro. C. C. 139; *Wood* v. *Downes*, 13 Ves. 128; *Roche* v. *O'Brien*, 1 Ball & B. 330; *Roberts* v. *Tunstall*, 4 Hare, 257): and it must be an act separate and distinct from the impeachable transaction, and not, as in the principal case, a conveyance executed in consequence of a contract or covenant connected with it: *Morse* v. *Royal*, 12 Ves. 370; *Wood* v. *Downes*, 18 Ves. 124, 128; *Roche* v. *O'Brien*, 1 Ball & B. 338. A confirmation of an invalid sale, by the majority of the creditors of a bankrupt, will not be binding upon the minority: see *Ex parte Lacey*, 6 Ves. 628; *Sir G. Colebrooke's case*, cited *Ex parte Hughes*, 6 Ves. 622, overruling *Whelpdale* v. *Cookson*, cited in *Campbell* v. *Walker*, 5 Ves. 682; *S. C.*, 1 Ves. 9; *Ex parte Thwaites*, 1 M. & A. 323; *Tommey* v. *White*, 3 H. L. Cas. 49.

LAKE *v.* GIBSON.

Trin. Term, 1729.

[REPORTED 1 EQ. CAS. AB. 294, PL. 3.]

JOINT PURCHASERS.]—*Where several persons make a joint purchase for the purposes of a joint undertaking or partnership, either in trade or any other dealing, although they are joint-tenants at law, in equity they will be considered as tenants in common, and the survivors as trustees for those who are dead.*

THE Commissioners of Sewers had sold and conveyed lands to five persons and their heirs, who afterwards, in order to improve and cultivate those lands, entered into articles whereby they agreed to be equally concerned as to profit and loss, and to advance each of them such a sum to be laid out in the manurance and improvement of the land.

SIR JOSEPH JEKYLL, M. R., held that they were tenants in common, and not joint tenants, as to the *beneficial interest* or *right* in those lands, and that the survivor should not go away with the whole; for then it might happen that some might have paid or laid out their share of the money, and others, who had laid out nothing, go away with the whole estate.

And his Honor held, that when two or more purchase lands, and advance the money in *equal* proportions, and take a conveyance to them and their heirs, that this is a joint-tenancy; that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other; but where the proportions of the money are *not equal*, and this appears in the deed itself, this makes them *in the nature of partners;* and

however the legal estate may survive, yet the survivor shall be considered but as a trustee for the others, in proportion to the sums advanced by each of them.

So, if two or more make a joint purchase and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it; and that in all other cases of a joint undertaking or partnership, either in trade or any other dealing, they were to be considered as tenants in common, or the survivors as trustees for those who were dead.

LAKE *v.* CRADDOCK.

(*On an Appeal from the Decree at the Rolls in* LAKE *v.* GIBSON.)

De Term. S. Michaelis, 1732.

[REPORTED 3 P. WMS. 158.]

JOINT PURCHASERS.]—*Five persons purchased West Thorock Level from the Commissioners of Sewers, and the purchase was to them as joint tenants in fee; but they contributed rateably to the purchase, which was with an intent to drain the Level; after which several of them died. They were held to be tenants in common in equity; and though one of these five undertakers deserted the partnership for thirty years, yet he was let in afterwards, on terms.*

THE case was thus: Great part of the lands in West Thorock, in Essex, having been overflowed by the river Thames near Dagenham, and the landowners not thinking it worth their while to pay the assessments made on them by the Commissioners of Sewers, the commissioners decreed the lands to be forfeited, and conveyed them to three trustees in trust to sell, and raise money for the draining of these overflowed lands.

The defendant Craddock's father, the plaintiff Lake, and three others, five in all, having entered into an undertaking to drain the level or overflowed lands of West Thorock, the trustees for the sale, by the consent and direction of the Commissioners of Sewers, did, by deed, indented and enrolled, dated the 8th of February, 1695, in consideration of 5145*l.* paid to the Commissioners by the five purchasers, convey this level to the defendant Craddock's father, the plaintiff Lake, the three others, and their heirs; upon which several sums of money were

expended in carrying on the undertaking; and in 1699, the defendant Craddock's father paid his last contribution, which, with what he had advanced before, came in all to 1025*l.*

Afterwards, it seeming to be an enterprise which would prove very expensive, and there being some uncertainty as to the success of it, the defendant Craddock's father wholly deserted it, and never more concerned himself therewith.

The four other undertakers were advised that some neighbouring lands would be of service to their design; upon which, in April, 1703, they purchased the manor of Porretshalls, in West Thorock, of the Lady Smith, for 2550*l.*, and in February following purchased the moiety of the rectory and tithes of West Thorock for 1400*l.* of Sir Charles Tyrrell; which two purchases were thought useful in the undertaking, and were made in the names of the four undertakers, omitting Craddock; nor did it appear that he was ever consulted therein, or desired to contribute to the purchase. Craddock, the father, died, leaving the defendant Craddock, the son, his *heir* and *executor*.

The plaintiff, Sir Bibye Lake, one of the original partners, brought this bill against the rest of the partners, or their representatives, for an account and division of the partnership estate. And on the first coming on of the cause, at the Rolls, his Honor referred it to the Master to state a case between the parties, for the judgment of the Court. And the Master having made his report, the cause was thereupon heard, when the principal, or rather the only question was, whether these five purchasers having made this purchase jointly, so as to become in law joint tenants, the same should survive in equity?

Sir *Joseph Jekyll*, M. R., on debate, decreed that the survivorship should not take place; for that the payment of money created a trust for the parties advancing the same; and an undertaking upon the hazard of profit or loss was in the nature of merchandising (*a*), when the jus accrescendi is never allowed; that supposing one of the partners had laid out the whole of the money, and had

(*a*) 1 Inst. 182; 1 Vern. 217; 2 Lev. 188, 228.

happened to die first, according to the contrary construction, he must have lost all, which would have been most unjust (*a*). Wherefore, it was decreed that these five purchasers were tenants in common, not only as to the level lands which were first purchased, but also with respect to the lands bought afterwards by the four undertakers of the Lady Smith and Sir Charles Tyrrell; but that the defendant Craddock ought not to have the benefit of this tenancy in common, unless he would pay so much money as would make up what had been already advanced by his father equal to what had been contributed by each of the other partners, together with interest for the same from the respective times that Craddock, the father, ought to have made those payments; and on the defendant Craddock's paying the same, then all the said lands to be divided into five parts, the defendant Craddock to have one-fifth: but, on default of payment, the defendant Craddock to be excluded, and the lands to be divided and distributed into four parts among the four other partners.

(*a*) See 9 Ves. 549; *Dale* v. *Hamilton*, 5 Hare, 385.

Argument for the Appellant.

From this decree the defendant Craddock appealed to the Lord Chancellor *King*, insisting that he ought either to receive back the 1025*l.*, which it was admitted his father expended in this undertaking, or to be allowed to come in for a share of the level only, and not to be bound to contribute towards the two purchases made by the four other undertakers of the Lady Smith and Sir Charles Tyrrell: that the four other undertakers had chosen to make these two purchases in their own names only, by which they seemed to have excluded Craddock from all concern therein, and of which, had it proved never so beneficial, he would have had no means of forcing them to admit him to a share; and therefore, now that it had turned out a losing bargain, there could be no reason to compel him to bear a proportion of the loss. Besides, there was nothing in the articles empowering the partners, or the major part of them, to buy lands; and, by the same reason that they would oblige Craddock to pay his share towards these purchases, they might, if they had fancied

buying half the country, have compelled him to contribute to that also. That it was difficult to conceive how the uplands thus purchased, much less the tithes, could be of any use in the undertaking; though, as to the charge of draining the level, exclusive of the two purchases, the defendant Craddock was willing to advance his proportion.

It was, moreover, pretended, that the decree was unreasonable, on account of its having directed that the defendant Craddock, in order to be admitted to one-fifth, should pay not only his proportion of those two purchases, but also of the interest of the purchase-money, from the time that his father ought to have made these payments: whereas the direction ought to have been, that an account should be taken of the profits of these two purchases, which profits might have amounted to as much as the interest, or, if not quite so much, yet that the defendant Craddock ought to pay no more towards such interest than the deficiency of the quantum of the profits would come to.

Argument for the Respondent.

To which it was answered by Mr. Solicitor *Talbot* that, as the defendant Craddock's father and himself had for so long a time (near thirty years) relinquished and abandoned the partnership, and in regard that the defendant Craddock had no manner of right thereto but through the indulgence of a court of equity (it being, by law, a joint-tenancy, and as such, belonging to the survivors), it was a favourable decree to let him in upon any terms; and surely the terms now offered him must appear reasonable, viz., that he should, upon his contributing to all the expenses that had been contracted and incurred by reason of any purchases or otherwise, in the prosecution of the undertaking, be admitted to one-fifth of the partnership; that had the defendant Craddock brought his bill for the benefit of such undertaking, he could not have hoped to succeed on any other conditions: that it was still stronger against him, in that he now seemed to decline meddling with the undertaking, so that here was rather great favour shown him than any hardship imposed: that he was not absolutely and at all events bound by this

decree to pay his proportion towards the new purchases, but had it in his election whether he would do it or no: that, as to the interest which was required of him previous to his being admitted into the partnership, it was reasonable he should pay it for his default in not having contributed his share of the principal before, which if he had done, he would not have been charged with the interest; and this was some disadvantage to the other four partners, who had been deprived of their arrear of interest for near thirty-five years: that, in truth, the design of the defendant Craddock appeared to be to delay matters, and to defer the bringing in of his money and interest till such time as this long account of the profits should be taken, which would require many years; and that if the defendant's share of the profits of these two purchases should exceed his proportion of the interest, the surplus, on the making up of the accounts, must be paid him.

For these reasons, the decree of the Master of the Rolls was affirmed.

(*a*) This judgment is from Sug. V. & P. 903, 11th edit., and is there stated to have been taken from unprinted MS.

Lord Chancellor King (*a*) said, that this was plainly a tenancy in common *in equity*, though otherwise *at law;* and the defendant Craddock having only a title in equity, that he must do equity, and that this was equitable in all its branches; for he had his election to drop all claim, or to take it on the same foot with the rest of the partners; and that it was not reasonable that he should be let into the account of the profits or loss of the undertaking until he had made his election.

It is an invariable rule at law, that, when purchasers take a conveyance to themselves and their heirs, they will be joint tenants: and, upon the death of one of them, the estate will go to the survivor. See Litt. s. 280.

The same rule prevails in equity, except where circumstances exist from which the rule of law is controlled by the presumed intention of the parties. Thus, as is laid down by Sir *Joseph Jekyll* in *Lake* v. *Gibson*, where two or more pur-

chase lands and advance the purchase-money in *equal* proportions, and take a conveyance to them and their heirs, they will be held joint tenants in equity as well as at law, upon this principle, that it may be presumed they intended to purchase jointly the chance of survivorship. The rule of law, therefore, not being repugnant to the presumed intention of the parties, will be followed in equity. See *Taylor* v. *Fleming*, cited in *York* v. *Eaton*, Freem. 23; *Rigden* v. *Vallier*, 3 Atk. 735; *S. C.*, 2 Ves. 258; *Rea* v. *Williams*, Sugd. V. & P., App. No. xxi., 11th ed. See *Rex* v. *Williams*, Bunb. 342; *Harris* v. *Fergusson*, 16 Sim. 308.

Upon the same principle, where persons have entered into a joint contract for the purchase of an estate to them and their heirs, and have paid or contracted to pay the purchase-money in *equal* proportions, a court of equity will not, upon the death of one of them, decree a conveyance to the survivor and the heirs of the deceased purchaser as tenants in common; for if both parties to the contract contribute *equally* towards the purchase-money, the surviving purchaser will be solely entitled to the benefit of the contract, and to have a conveyance of the estate decreed to himself alone. See *Aveling* v. *Knipe*, 19 Ves. 441, where Sir *W. Grant*, M. R., observed that a doubt had been suggested whether a court of equity would in any case execute such an agreement by a conveyance in joint-tenancy. "It would not," observed his Honor, "if there were any circumstances from which it could be collected that a joint-tenancy was not in contemplation; but I have no conception that it is of course upon a controversy between two purchasers to depart from the letter of the agreement, and decree them to be tenants in common." And see *Davis* v. *Symonds*, 1 Cox, 402.

In equity, however, there is a strong leaning against joint-tenancy; and whenever circumstances occur from which it can reasonably be implied that a tenancy in common was intended, a court of equity will hold the survivors of joint purchasers trustees of the legal estate for the representatives of the deceased purchaser.

In *Lake* v. *Gibson*, Sir *Joseph Jekyll* lays it down as a general rule, that, where two or more purchase lands and advance the purchase-money in *unequal* proportions, and this appears on the deed itself, this makes them *in the nature of partners*, and, however the legal estate may survive, yet the survivor will be considered in equity but as a trustee for the other, in proportion to the sums advanced by each of them. See also *Rigden* v. *Vallier*, 3 Atk. 735; *S. C.*, 2 Ves. 258. The soundness of the distinction between *equal* and *unequal* advances is doubted by Mr.

Vesey, in a note to *Jackson* v. *Jackson*, 9 Ves. 597. "If," he observes, "the advance of consideration, generally, will not prevent the legal right, the mere *inequality* of proportion, which may be naturally attributed to the relative value of the lives, ought not to have that effect." Sir *Edward Sugden*, however, thought the distinction founded on rational grounds. "Where the parties," he observes, "advance the money *equally*, it may fairly be presumed that they purchased with the view to the benefit of survivorship: but where the money is advanced in *unequal* proportions, and no express intention appears to benefit the one advancing the smaller proportion, it is fair to presume that no such intention existed; the *inequality* of proportion can scarcely be attributed to the relative value of the lives, because neither of the parties can be supposed not to know that the other may, immediately after the purchase, compel a legal partition of the estate, or may even sever the joint-tenancy by a clandestine act:" Sugd. V. & P. 902, 11th ed.; see 14th edit. 698. Sed vide *Harris* v. *Fergusson*, 16 Sim. 308. Explained, however, in *Robinson* v. *Preston*, 4 K. & J. 515.

It will be observed, that Sir *Joseph Jekyll* qualifies the general rule laid down in the principal case of *Lake* v. *Gibson* by the words "and this appears upon the deed itself." Lord *Hardwicke*, however, lays down the same rule without this qualification, *Rigden* v. *Vallier*, 3 Atk. 735: 2 Ves. 258; and see *Harrison* v. *Barton*, 1 J. & H. 293; *Hill* v. *Hill*, 8 I. R. Eq. 140.

The circumstances, however, attending a purchase in the names of two persons advancing the purchase-moneys in equal proportions, may show an intention that the parties should hold as tenants in common. Thus, in *Robinson* v. *Preston*, 4 K. & J. 505, two ladies, about the same age, who lived together in a common establishment, were tenants in common of land, the rents of which were from time to time paid to their joint account at a bank, upon which they both drew drafts as they had occasion, and the bankers were in the habit of investing portions of the balances in their joint names; and upon one occasion, part of the money drawn from their joint account in the bank was invested upon a mortgage to them as tenants in common, in which there was a declaration (perfectly unnecessary) that the two ladies should hold as tenants in common. The surviving sister (who afterwards became a lunatic), by her will bequeathed to her sister her share of the stock standing in the joint names of herself and her sister. It was held by Sir *W. Page-Wood*, V.-C., on the death of the other sister, that the two sisters held the stock purchased in their joint names, and

the balance to their joint account at their bankers, as tenants in common. "I am not," said his Honor, "aware of any decision as to the effect of a payment of moneys in which two or more persons are interested as tenants in common to their joint account at a banker's, whether such a payment would fall within the doctrine as to mortgages, or within that as to purchases; and perhaps I might be allowed to entertain some degree of doubt if the case rested simply there; but the bankers, from time to time, invested portions of these moneys, and I must assume that they did so by the direction of both ladies in the purchase of stock in their joint names; which, no doubt, as it was argued, they might have invested in equal moieties, one in the name of each lady." And after referring to *Edwards* v. *Fashion*, Prec. Ch. 332 (post, p. 208), where mortgagees purchasing the mortgaged estate were held to be tenants in common, his Honor, quoting Sir *Wm. Grant*, proceeds to observe: "That case proceeds on the ground that the purchase was founded on the mortgage; and the mortgagees being tenants in common of the mortgage were held to be tenants in common of the equity of redemption likewise. That is a case that has some bearing upon the present, when one looks to what was the root of the property now in question, viz., rents of land held by the two ladies as tenants in common.

"But besides the first point, as to the root of the property, there is a second, viz., that where it was necessary for a deed to be executed, as in the case of the mortgage, there was actually a declaration that they would hold the money so invested as tenants in common. With regard to the investments in the purchase of stock, in those transactions there was, of course, no necessity for a deed to be executed, or any memorandum signed.

"Then I find the third point,—perhaps the strongest of all—viz., that the sister who proved to be the survivor, and against whom, of course, her own declaration may be read, by her will, executed in the lifetime of her sister, not only speaks of 'her share' of the property in question, but affects to dispose of it in favour of her sister; and further, on the assumption that her sister will survive her, she directs that, after her sister's decease, a legacy of 350*l.* stock should be paid out of a part of the stock in question, that part standing exactly in the same position as the rest.

"These three circumstances concurring, and the whole being a question of intention, to be ascertained from the circumstances of the case, it is not illogical to say, that the three combined have a force and carry a conviction, which perhaps any one of them

taken alone would not produce." But see and consider *Bone* v. *Pollard*, 24 Beav. 283.

And it seems that parol evidence of subsequent dealings, as well as of surrounding circumstances, is admissible on a purchase by two persons contributing equally to the cost of it, to prove an intention to hold in severalty (*Harrison* v. *Barton*, 1 J. & H. 287); but it seems that parol evidence of statements of intention is not admissible.—*Ib.* But see *Devoy* v. *Devoy*, 3 Sm. & G. 403.

Again, where money is advanced by persons, either in *equal* or *unequal* shares, who take a mortgage to themselves jointly, although the debt and security will at law belong to the survivor, in equity there will be a tenancy in common, the survivor being a trustee for the personal representatives of the deceased mortgagees: (*Petty* v. *Styward*, 1 Ch. Rep. 31 Eq. Ca. Ab. 290; *Rigden* v. *Vallier*, 2 Ves. 258). For "equity says it could not be the intention that the interest should survive. Though they take a joint security, each means to lend his own and to take back his own:" Per Lord *Alvanley*, M. R., in *Morley* v. *Bird*, 3 Ves. 631; and see *Robinson* v. *Preston*, 4 K. & J. 505, 511.

The personal representatives of the deceased mortgagees were therefore necessary parties to a bill of foreclosure or redemption (*Vickers* v. *Cowell*, 1 Beav. 529); and although the entire legal estate is in the survivor, they are necessary parties to a reconveyance, in order that they may give a valid discharge for their share of the mortgage-money: Carth. 16. Hence it is usual, where trustees advance money on mortgage, to insert a declaration, that, if one of the mortgagees die before the money is paid off, the receipt of the survivor shall be a sufficient discharge; and that the concurrence of the personal representative of the deceased mortgagee shall not be requisite. See *Matson* v. *Denis*, 12 W. R. (V.-C. S.) 596.

If joint mortgagees purchase or foreclose the equity of redemption, they will be held, in equity, tenants in common, "because their intent is presumed to be so:" *Rigden* v. *Vallier*, 2 Ves. 258. Thus in *Edwards* v. *Fashion*, Prec. Ch. 332, where the two daughters of a mortgagee for a term of years, taking under his will the residue of his personal estate, including the mortgage, equally to be divided between them, afterwards purchased the equity of redemption to them and their heirs, it was held, that there was no survivorship, upon the ground that the purchase *was founded on the mortgage*, and the daughters being tenants in common of the mortgage, they were held to be tenants in common of the equity of redemption likewise. See *Aveling* v. *Knipe*, 19 Ves. 444; and the comments therein of Sir *Wm.*

Grant, M. R., on *Edwards* v. *Fashion*.

Another rule laid down by the Master of the Rolls in *Lake* v. *Gibson* is, that, in all cases of a joint undertaking or partnership, either in trade or in any other dealing, two or more persons who make a joint purchase will be considered in equity as tenants in common, or the survivors as trustees for the representatives of those who are dead. This was the ground of the decision in *Lake* v. *Gibson*, or *Lake* v. *Craddock*, which shows that a joint speculation in improving land, on a hazard of profit and loss, is treated in a court of equity, as in the nature of merchandise, and the jus accrescendi is not allowed. See *In re Thomas Ryan*, 3 I. R. Eq. 222, 232.

In favour of merchandise it is well known that an exception to the rule of survivorship has been long established. It is thus stated in Co. Litt. 182, a :—"An exception is to be made of two joint merchants: for the wares, merchandises, debts, or duties that they have as joint merchants or partners shall not survive, but shall go to the executors of him that deceaseth; and this is per legem mercatoriam, which (as hath been said) is part of the laws of this realm, for the advancement and continuance of commerce and trade, which is pro bono publico; for the rule is, that *jus accrescendo inter mercatores pro beneficio commercii locum non habet*." And see *Nelson* v. *Bealby*, 30 Beav. 472; *Ambler* v. *Bolton*, 14 L. R. Eq. 427; *M'Clean* v. *Kennard*, 9 L. R. Ch. App. 336.

The exception in favour of merchants was afterwards extended to all traders; and courts of equity have extended it to the analogous cases of real property purchased for a joint undertaking or partnership in trade, or in any other dealing. It has been remarked by Sir *James Wigram*, V.-C., that the consequences of the admission of the partnership contract were carried to a great length in *Lake* v. *Craddock*; "for one of the five original contractors," observed his Honor, "who had retired for nearly thirty years, was held bound by a subsequent contract, made by the other four, for the purchase of other lands in aid of the original design;" 5 Hare, 384. In *Jefferys* v. *Small*, 1 Vern. 217, where two persons having jointly stocked a farm, and occupied it as joint tenants, the bill was to be relieved against survivorship, one of them being dead, Lord Keeper *North* was clearly of opinion that the plaintiff ought to be relieved, and said that, if the farm had been taken jointly by them, and proved a good bargain, then the survivor should have the benefit of it; but as to a stock employed in the way of trade, that should in no case survive. That the cus-

tom of merchants was extended to all traders, to exclude survivorship: and though it was common for traders in articles of co-partnership to provide against survivorship, yet that was more than was necessary; and he said, he took the distinction to be, where two became joint tenants, or jointly interested in a thing by way of gift or the like, there the same shall be subject to all the consequences of law; but as to a joint undertaking in the way of trade or the like, it is otherwise; and decreed for the plaintiff accordingly. Lord *Eldon*, in commenting upon this case, observed: —"*Jeffereys* v. *Small* has been approved, with some distinctions, in subsequent cases. It was held, in that case, that, if two take a lease of a farm jointly, the lease shall survive, but the stock on the farm, though occupied jointly, shall not survive. I have a note of my own of a case of *Elliot* v. *Brown*, upon the 25th of July, 1791, in which another distinction was made by Lord *Thurlow*, that the law, with reference to the stock, would be the same as to lease, *provided the lease was taken only upon the same purpose as the stock*, and the lease was only the substratum; and *Lake* v. *Gibson* was referred to. The observation upon that was, that the purchase of the land was made to the intent that they might become partners in the improvement; that it was only the substratum for an adventure, in the profits of which it was previously intended they should be concerned: *Jackson* v. *Jackson*, 9 Ves. 596. In *Elliot* v. *Brown* (since reported, 3 Swanst. 489), there was a lease of a farm to two partners; one partner dying, the other agreed to a division of stock with the representatives of the deceased partner, but insisted on holding the lease by survivorship; Lord *Thurlow*, however, thought the lease was accessory to the trade in which the parties were embarked, and granted an injunction to restrain the surviving partner from proceeding by ejectment to obtain possession of the farm." From Lord *Colchester's* MSS. See also 1 Vern. 217, n. (3).

So, likewise, in *Lyster* v. *Dolland*, 1 Ves. jun. 421, where two persons took a building lease, and laid out money in erecting houses, Lord *Thurlow* held them to be partners in respect of this property; and the survivor was decreed to be a trustee of a moiety for the representatives of the deceased partner. "Though," observed his Lordship, "if two persons take a farm, the lease will survive, yet has it not been determined that, if they lay out money jointly upon it, that turns round the estate at law, and makes it equitable? I allude to the case of a joint lease [illegible] or a fee purchased to carry on a joint trade; the object being to carry on the trade, the Court thought

it would convert the joint property for the purposes of trade, and making a common advantage. I am now clearly of opinion, that, if partners purchase leasehold or freehold to carry on trade, that will carry with it all those circumstances." See also *Crawshay* v. *Maule*, 1 Swanst. 508.

A deceased partner may, however, have so conducted himself by repudiating a contract, as for instance a lease of ground for a building speculation, as to preclude his executors from claiming a share in the lease: *Reilly* v. *Walsh*, 11 Ir. Eq. Rep. 22. And see *Norway* v. *Rowe*, 19 Ves. 143; *Clements* v. *Hall*, 24 Beav. 333.

And though the conveyance of real estate be taken in the name of one of the partners, having been purchased with partnership funds, it will be part of the partnership property; *Smith* v. *Smith*, 5 Ves. 193; *Clegg* v. *Fishwick*, 1 Mac. & G. 294. And see *Tibbits* v. *Phillips*, 10 Hare, 355.

The question whether property purchased with partnership assets is joint or separate property of the partners depends upon the circumstances under which and the purposes for which it was bought. Thus, in the *Bank of England Case*, 3 De G. F. & Jo. 645, one of t[illegible] partners carrying on the business of leather factor bought lands for the purpose of erecting a residence on part of it, and selling the remainder to a railway company. He offered a share to his partner, who was also desirous of building a house out of town for his residence. The offer was accepted, and the purchase money paid out of the partnership assets; but the conveyance was to the partners in separate moieties, each of which was conveyed to the usual uses to bar dower. The partners at their individual expense built houses upon portions of the land set apart for the purpose, but the other expenses relating to the land were paid out of the partnership assets. It was held by the Lords Justices that the whole of the land constituted joint estate. "Questions of this nature," said Lord Justice *Turner*, "depend, as I apprehend, generally, if not universally, upon the circumstances. It cannot, I think, be laid down as an universal rule, that when lands are bought by partners in trade, and are paid for out of the partnership assets, they of necessity become part of the joint estate of the partners. There are different purposes for which the lands may have been bought. They may have been bought for the purpose of being used and employed in the trade, but for the purpose of a mere speculation on account of the partnership, for I know nothing which can prevent partners from speculating in land, if they think proper to do so, as freely as they may speculate in mere articles of

commerce, though foreign to their trade. Again, they may have been bought without reference to the purposes of the trade or the benefit of the partnership, with the intention of withdrawing from the trade the amount employed in the purchase, and converting that amount into separate property of the partners, or they may have been bought on account of one or more of the partners, he or they becoming debtors to the partnership for the amount laid out in the purchase. The form of the conveyance in these cases does not settle the question, for in whatever form the conveyance may be, there may be a trust of the land which may follow the money, liable, however, as other trusts are, to be rebutted by evidence. Where land purchased is not merely paid for out of the partnership assets, but is bought for the purpose of being used and employed in the partnership trade, it is scarcely possible to conceive a case in which there could be sufficient evidence to rebut the trust, and accordingly in these cases we find the decisions almost if not entirely uniform—that the purchased land forms part of the joint estate of the partnership; but where the land is not purchased for those purposes, the question becomes more open, and we have to consider whether the circumstances attending the purchase show that it was made on account of the partnership, or of any one or more of them individually, in whose name the land may have been bought. . . . I am of opinion that, looking at the case with reference to the whole of the estate, this purchase must be taken to have been made by way of speculation on account of the partnership, and that the petition of the Bank of England accordingly fails and must be dismissed."

Where property is *not purchased* by persons for partnership purposes, but is *devised* to them as joint tenants, although they make use of it for partnership purposes, they will not be held tenants in common in equity, unless by express agreement, or by their course of dealing with it for a long period, it may be inferred that they meant to sever the joint tenancy. In *Jackson* v. *Jackson*, 9 Ves. 591, a testator left leasehold and other personal estate embarked in trade to his two sons, as joint tenants, who continued to carry on the trade for twelve years, when one of them died. Lord *Eldon*, overruling the decision of Sir *W. Grant*, M. R. (reported 7 Ves. 535), held, that, under all the circumstances of the case, the two sons of the testator were to be considered as tenants in common of his property embarked in trade, from the time they were let into possession, including as well the capital as the profits; for, though there might be cases of distinction between them, the

course of dealing for so many years ought to be taken as evidence that they meant to sever the joint tenancy. See also *Brown* v. *Oakshot*, 24 Beav. 254; *Ward* v. *Ward*, 6 L. R. Ch. App. 789. In the case, however, of *Morris* v. *Barrett*, 3 Y. & J. 384, in the Exchequer, a testator *devised and bequeathed* the residue of his real and personal estate to his two sons, their heirs, executors, and administrators. The two sons, after their father's death, during the period of twenty years, carried on the business of farmers with such estate, and kept the monies arising therefrom in one common stock, and, with part of such moneys, *purchased other estates* in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other. One of the brothers died; and upon a bill being filed by the legatees and persons beneficially entitled under his will, it was admitted, by the counsel of the surviving brother, that the estates *purchased* with the profits of the business and the partnership stock were held by the brothers as tenants in common, but they contended that the leasehold estates and the personal estate which the father *bequeathed* to them were held by them as joint tenants; that where real estates, conveyed to persons as joint tenants, had been adjudged to have been held by them as tenants in common, the estates had been *purchased* expressly for the purpose of a partnership, or for a joint speculation, as in *Lake* v. *Craddock*, and that no case could be cited in which real estate *devised* had been converted from an estate in joint tenancy to a tenancy in common: *Alexander*, C. B., held that the brothers remained joint tenants of all the property that passed by the will of their father, but were tenants in common of the after-purchased lands.

In *Dale* v. *Hamilton*, 5 Hare, 369, it was held by Sir *J. Wigram*, V.-C., that a partnership agreement between A. & B. that they should be jointly interested in a speculation for buying, improving for sale, and selling lands, might be proved without being evidenced by any writing signed by, or by the authority of, the party to be charged therewith, within the Statute of Frauds; and that such an agreement being proved, A. or B. might establish his interest in the land, the subject of the partnership, without such interest being evidenced by any such writing. See *S. C.*, 2 Ph. 266; and *Darby* v. *Darby*, 3 Drew. 495; but see and consider *Caddick* v. *Skidmore*, 2 De G. & Jo. 52; *Smith* v. *Matthews*, 3 De G. F. & Jo. 139, 151.

Conversion of real estate held by partners for partnership purposes.]

—Where partners hold real estate for partnership purposes, a question arises, which was not decided in *Lake* v. *Gibson*, and *Lake* v. *Craddock* (in which case the defendant Craddock, it will be observed, was both heir-at-law and executor of his father), whether the real estate is not, even in the absence of any expressed intention of the partners, so absolutely converted into personalty as to be held by the surviving partners, not in trust for the heir-at-law, but for the personal representatives, of the deceased partner.

It is clearly settled, that where real estate is purchased *with partnership capital*, for the *purposes of partnership trade*, it will, in the absence of any express agreement, be considered as absolutely converted into personalty; and, upon the death of one of the partners, his share will not go to his heir-at-law, nor be liable to dower, but will belong to his personal representatives. See *Townsend* v. *Devaynes*, 1 Mont. on Partnership, Append. 97; 1 Rop. H. & W., Jac. ed. p. 346; *Selkrig* v. *Davies*, 2 Dow. 231. So, in *Phillips* v. *Phillips*, 1 My. & K. 649, Sir *J. Leach*, M. R., held, that freehold and copyhold public-houses, purchased with partnership capital, and conveyed to the two partners and their heirs, for the purposes of the partnership trade, were to be considered as personal estate generally, and not only for the payment of the partnership debts. "I confess," observed his Honor, "I have for some years, notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, *purchased with partnership capital for the purposes of the partnership trade*, continued to be partnership capital, and to have, to every intent, the quality of personal estate; and in the case of *Fereday* v. *Wightwick*, 1 Russ. & My. 45, I had no intention to confine the principle to the payment of the partnership demands. Lord *Eldon* has certainly, upon several occasions, expressed such an opinion. The case of *Townsend* v. *Devaynes* is a clear decision to that effect, and general convenience requires that this principle should be adhered to." This decision has been followed in *Broom* v. *Broom*, 3 My. & K. 443; *Morris* v. *Kearsley*, 2 Y. & C. Excheq. Ca. 140; *Bligh* v. *Brent*, 2 Y. & C. Excheq. Ca. 268; *Houghton* v. *Houghton*, 11 Sim. 491. *In re Thomas Ryan*, 3 I. R. Eq. 232.

It has, however, been held in some cases that where real estate belonged to the partners at the time of their entering into partnership, or has been subsequently acquired by them out of their own private moneys, or by gift, conversion will not, unless by express agreement, take place, although the real estate has been used for the partnership purposes in trade. See *Thornton* v. *Dixon*, 3 Bro.

C. C. 199; *Balmain* v. *Shore*, 9 Ves. 500; *Cookson* v. *Cookson*, 8 Sim. 529; Bisset on Partnership, 50.

In more recent cases, proceeding upon a broader principle, it has been laid down that where real property has been substantially involved in a business in trade, it is part of the partnership property, and therefore personal estate, and that it is immaterial how it may have been acquired by the partners, whether by descent or devise. See *Waterer* v. *Waterer*, 15 L. R. Eq. 402. There J. Waterer was seised of real estate, upon part of which he carried on the business of a nurseryman, under the name of J. Waterer & Sons. He was assisted by his three sons in his business, but they were not in reality partners. J. Waterer having contracted for the purchase of a house and farm for the purpose of his business, died on the 2nd of November, 1868, having by his will devised his real estate, and his residuary personal estate to his three sons as tenants in common. After his death, the contract for the purchase of the farm was carried into effect by his three sons, to whom the land was conveyed as tenants in common. For a short time the business was carried on by the three sons under the same style as before. It appears that the residuary real and personal estate of the testator (except invested property) was employed in the business. In April, 1869, Michael, one of the sons, retired from the partnership, and the two others purchased his one-third share in the residuary and real estate, and of the good will in the business, for a sum which was paid for partly out of the estate, and partly out of moneys borrowed on the land.

The two continuing partners carried on the business of nurserymen under the old style, upon the same land as their father, and also on the purchased land. The share of Michael was purchased only in order to enable the other two brothers to carry on the business. On the 4th of October, 1871, one of the partners died intestate, leaving a widow and children. It was held by *James*, L. J., sitting for *Wickens*, V.-C., that both the devised and the purchased land employed in the business was converted into personalty. "I am of opinion," said his Lordship, "that this case is governed by that class of cases in which Lord Eldon said that where property became involved in partnership dealings, it must be regarded as partnership property. It seems to me immaterial how it may have been acquired by the two surviving partners, whether by descent or devise, if, in fact, it was substantially involved in the business. If instead of Michael selling his undivided third part, there had been a partition beforehand, and

then a purchase by the other partners of his allotment, it would have been impossible to say that the freehold so bought to carry on the business was not within the authorities. They buy it, not as an undivided third only, but in one lump, for one lump sum, including the good-will, therefore it was, in fact, a purchase of land and business altogether, by the continuing partners jointly, for the purpose of the business. Under those circumstances, I think they must each be deemed to have irrevocably appropriated each of them his share in the land to the partnership purposes. A nursery-gardener's business is probably one above all others where men would act as these gentlemen appear to have done. They necessarily appropriated the soil itself for gardening purposes, which could not be carried on without it. It is, in fact, in nursery-gardening, practically impossible to separate the use of the soil for the trees and shrubs from the trees and shrubs themselves, which are part of the freehold, and at the same time constitute the substantial stock-in-trade. In my judgment, therefore, the land used in the trade is part of the partnership property, and therefore personal estate. The house and land not used for the partnership business, but let to tenants, remain real estate."

The principle upon which cases of this kind proceed appears to be this: that as a general rule, inherent to the contract of partnership, and without any special stipulation, upon the dissolution of partnership all the property of the partnership must be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, must be divided among the partners, according to their respective shares in the capital, and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his share of it in specie. It follows then that any real property which has become the property of the partnership becomes, by force of the partnership contract, converted into personalty, and that not merely as between the partners to the extent of discharging the partnership debts, but as between the real and personal representatives of deceased partners. See *Darby* v. *Darby*, 3 Drew. 495, 503, 506.

Where, however, real estate was purchased for the purposes of a partnership in trade, and paid for out of the partnership capital, but upon an agreement between the partners, that it was to be the separate property of one of them, who took a conveyance of it in his own name, Lord *Eldon* held, that he was debtor to the partnership for so much money as he borrowed, and that the property not being

partnership property, his wife was entitled to dower of the whole. *Smith* v. *Smith*, 5 Ves. 193.

Where real estate is purchased by partners out of the partnership capital, but not for the purposes of the partnership *in trade*, it will not be converted into personalty.

Thus, in *Bell* v. *Phyn*, 7 Ves. 453, three persons, carrying on business as merchants, in London, joined with another person in the purchase of a plantation in the Island of Grenada, two-thirds of which were to belong to the partners and the remaining third to another person. Part of the purchase-money for the two-thirds was paid out of the funds of the partnership, and the parties severally covenanted to pay the remainder. The accounts relative to the estate were kept in the partnership books. Further payments were made, from time to time, out of the partnership funds, till the death of one of the partners. Upon the death of one of the partners, the question arose, whether his share of the estate was real or personal. Sir *William Grant*, M. R., held that it was real. "Suppose," observed his Honor, "this was partnership property, I doubt whether the conveyance is a conversion: there was no occasion to call for it for any of the purposes of the partnership. It remains clear. Each might have entered into the enjoyment of his share. Then suppose all die. Why is it to be considered personal property—something different from what it really is, as between the real and personal representatives?" On a subsequent day his Honor said, that he doubted whether there was quite enough admitted by the heir to show that the estate at Grenada could be considered, in a proper sense, partnership property, but that the authority of *Thornton* v. *Dixon* went the full length of the point for the heir; for, even if it was partnership property, there was nothing done by the partners to alter the nature of it.

In *Randall* v. *Randall*, 7 Sim. 271, Richard and William Randall, tenants in common of an estate, in 1792 agreed to carry on the business of farming together, including the growing of hops; and in 1794 they entered into partnership as maltsters, and soon after as biscuit bakers. At that time, and during all the subsequent time, Richard Randall carried on his separate business as a land surveyor, and William Randall the business of a grocer. The farming and malting businesses were carried on upon the family estate, and the manufacture of biscuit partly on the family estate, and partly on Richard Randall's separate property. In 1802, Richard and William Randall purchased one-fourth of the family estate from their brother James; in 1803 land from Miss Long; and

in 1805 land from Joseph Tarver. No conveyance was executed of the land so purchased, except those purchased of Tarver, which were conveyed, as to one moiety, to the use of Richard Randall in fee, and, as to the other moiety, to the use of William Randall, and a trustee in the usual manner, to bar dower. All the lands so purchased were paid for out of the partnership moneys, and (excepting the family estate, where the malting and biscuit making were partly carried on) were used solely for farming and agricultural purposes. In 1820, Richard and William Randall purchased, with partnership moneys, two messuages and gardens in Portsea, which were conveyed in the same manner as the lands purchased from Tarver. This property was not used for any partnership purposes, but was let to tenants. In or before 1815, all the partnership *business in trade* had been given up, but the farming business was carried on in partnership up to August, 1827, when it was terminated by the death of Richard Randall. Sir *L. Shadwell*, V. C., after an elaborate examination of the authorities, held, that the lands were not converted into personalty. "It does not," said his Honor, "appear that the parties purchased any part of the land for the purposes of their *partnership in trade*. Having in the first instance agreed to carry on the farming business in partnership, they subsequently agreed to become copartners, first as maltsters, and afterwards as biscuit bakers. The first purchase that they made was of an undivided fourth part of an estate, of which they previously had a moiety as tenants in common. It would, however, be strong to say, that, because these parties, being partners in the farming business, *which is not a trade*, happen, collaterally to that business, to carry on a trade, therefore the nature of the property which they so purchased is to be changed; and consequently, I do not think that it would be right to hold, that one-fourth of the family estates which Richard and William Randall purchased of their brother James is to be considered as partaking of the nature of personal estate.

"The next estate was purchased of Miss Long, but it was never used for any of the purposes of the partnership trade; and, as the judges who decided the cases to which I have alluded, have expressed their opinions to be, that land cannot become personal estate unless it is purchased for the purposes of the partnership trade, the land purchased of Miss Long, although it may have been paid for out of the partnership capital, cannot be considered as partaking of the nature of personal estate.

"With respect to the land purchased from Tarver, it was conveyed, as to one moiety, to the use

of Richard Randall in fee; and, as to the other moiety, to the use of William Randall and his trustee, to the usual uses to bar dower. Therefore there was no contract, either express or implied, that it should have any nature except that which was originally impressed upon it.

"The malting business ceased in 1807, and the biscuit baking in 1815. In 1820, the two brothers purchased two houses and gardens in Portsea, which of course were not used for farming purposes, but were let to tenants. These premises were conveyed in the same manner as the land purchased of Tarver; and if in those instances in which the lands purchased by the brothers were conveyed to them, it is to be inferred from the form of the conveyance that they intended to hold them as real estate, it is but fair to conclude that they intended to hold those lands which were not conveyed to them in like manner; for it would be unreasonable to suppose that they meant to hold part as land and part as impressed with the character of personal estate.

"The fair inference to be drawn from the facts of this case is, that the trade was collateral to, and arose out of, the principal business of farming; and there is no reason to conclude from any of the decided cases, that any of the property to which this suit relates ought to be considered as personal estate." See also *Steward* v. *Blakeway*, 6 L. R. Eq. 479; 4 L. R. Ch. App. 603.

If, however, the owners of real estate, upon entering into partnership, direct, or agree that it shall be sold upon the death of one of them, it will be held to be absolutely converted into personalty, and will go to the personal representative, and not to the heir of a deceased partner. See *Ripley* v. *Waterworth*, 7 Ves. 425; *Thornton* v. *Dixon*, 3 Bro. C. C. 199. In the recent case of *Essex* v. *Essex*, 20 Beav. 442, two persons seised of freeholds agreed to carry on business in partnership upon the premises for fourteen years, and that if either died during that term, the survivor should purchase the freeholds at a stated price. The fourteen years having expired, they by parol agreement continued the partnership "on the old terms;" one of them afterwards died intestate. It was held by Sir *J. Romilly*, M. R., that the stipulation as to purchase was binding, and that the freeholds were converted into personalty, and did not pass to the heir.

The share of a deceased partner in real estate purchased with partnership capital and used for partnership purposes in trade is now, it seems, held to be converted into personalty, not only as between the partners and the real and personal representatives of a deceased partner—but also for fiscal purposes, and that the Crown is en-

titled to the benefit of such equitable conversion, and can claim legacy and probate duty in respect of the property which at the death of the partner was existing as real estate. See *Forbes* v. *Steven*, 10 L. R. Eq. 178, 189, where it was held by *James*, V. C. (overruling the law supposed to have been established in *Custance* v. *Bradshaw*, 4 Hare, 315), that legacy duty was payable upon a share of a deceased partner—a domiciled Englishman, in the proceeds of freehold property in Bombay used for the purposes of the partnership, and forming a partnership asset, and the reasoning upon which the decision proceeded is equally applicable to show that it was liable to probate duty. See also *Attorney-General* v. *Brunning*, 8 Ho. Lo. Ca. 243; *Attorney-General* v. *Lomas*, 9 L. R. Exch. 29, 34. And Hanson on the Prob. Leg. and Succ. Duty Acts, pp. 148—155, 3rd ed. But see Dart, V. & P. 925, n. 5th ed.

But real estate, acquired by partners for the purposes of their business, may be dealt with by them in the conveyances in such a way as to prevent this result, by showing that conversion into personalty was not intended, as where, for instance, they procure it to be conveyed to them in equal undivided shares. *Custance* v. *Bradshaw*, 4 Hare, 315. See also the remarks in Hanson on the Prob. Leg. and Succ. Duty Acts, pp. 6, 148, 3rd ed.

And it seems that conversion will take place not only where real property is acquired for the purposes of partnership in trade, but also where it is acquired with partnership funds for the purpose of re-sale upon a speculation not properly coming under the denomination of trade. Thus, in *Darby* v. *Darby*, 3 Drew. 495, where two persons on a joint speculation with their joint moneys, purchased land for the purpose of laying it out in building lots, and re-selling it at their joint profit or loss, it was held by Sir *R. J. Kindersley*, V. C., that the land was converted out and out, and that the share of a deceased partner in part of the unrealised real estate passed to his personal representatives. "I can have no difficulty," said his Honor, "in coming to the conclusion, that whenever a partnership purchase real estate for the partnership purposes, and with the partnership funds, it is, as between the real and personal representatives of the partners, personal estate. Now this is not the ordinary case, where persons carrying on the ordinary business of a commercial or manufacturing partnership have found it necessary to purchase real estate for partnership purposes. That is not the case; here they bought land as stock in trade, by the sale of which they were to make their profits;—the land was not in the nature of plant, but was the very subject matter of their trade.

Does that make any difference? If it does, I think it is in favour of treating it as converted; because the real estate is here clearly put in the same position as ordinary stock in trade; and it appears to me, that if I entertained more doubt than I do on the general question, that doubt would in this case be very much diminished by the circumstance, that here the real estate is itself bought for the very purpose of selling it again. The very intention of the partnership was to buy land to re-sell it. That is their very contract; and, without selling the land again there would be no partnership business,—the partnership was for the purpose of buying land to parcel it out in plots, and to sell them again; and each partner had a right to say he would have that contract carried out. We have here what Lord *Thurlow* wanted in *Thornton* v. *Dixon* (3 Bro. C. C. 199)—an actual contract that the land shall be sold."

Where, as in the principal case, lands are held for partnership purposes, that is to say, for employment for some purposes which may produce a return in the shape of profits, so as to add to its value, the joint property will be liable to repay the advances of the various partners before any division can take place (21 Beav. 526); but this is not the case where persons are mere joint owners of lands. Thus, in *Kay* v. *Johnston*, 21 Beav. 536, the plaintiff and defendant were joint owners of a house, and the defendant had laid out, in improving and decorating it, moneys he had obtained from the plaintiff, it was held by Sir *J. Romilly*, M. R., that the plaintiff, in the absence of contract, had no lien on the share of the defendant in the house for the amount so laid out.

The Reconversion of partnership property into realty.]—Property purchased with partnership capital, for partnership purposes in trade, and therefore converted into personalty, may be reconverted by the express or implied agreement of the partners. Thus, in *Rowley* v. *Adams*, 7 Beav. 548, A. and B. purchased realty out of their partnership assets, which was used for their partnership purposes, and was in equity to be considered as personalty. A new partnership was formed between A., B., and C. The realty continued to be used for partnership purposes, but A. and B. stipulated for a rent to be paid them by the new partnership, composed of A., B., and C. A. died. Lord *Langdale*, M. R., held, that the property was to be considered as part of his real estate.

Where, however, land used for partnership purposes has been considered as converted into personalty, it is intimated by Mr. Dart to be his opinion, "that such

part of it as belongs to a surviving partner will remain personal estate as between his real and personal representatives, unless and until he indicates an intention that it shall be reconverted into realty, and that his mere winding up and discontinuing the business would probably be held to have that effect." Dart, V. & P. 928, 5th ed.

DYER *v.* DYER.

Nov. 20, 21, *and* 27, 1788. *In the Exchequer, before Lord Chief Baron Eyre, Baron Hotham, Baron Thompson.*

S. C., 1 Watk. Cop. 216.

[REPORTED 2 COX, 92.]

PURCHASE IN THE NAME OF A SON.—ADVANCEMENT.]—*Copyhold granted to A. and B. his wife, and C. his younger son, to take in succession for their lives and the life of the survivor. The purchase-money was all paid by A. C. is not a trustee of his life-interest for A.; but takes it beneficially as an advancement from his father.—Resulting trust.*

IN 1737, certain copyhold premises, holden of the manor of Heytesbury, in the county of Wilts, were granted by the lord, according to the custom of that manor, to Simon Dyer (the plaintiff's father) and Mary his wife, and the defendant William his other son, to take in succession for their lives and to the longest liver of them. The purchase-money was paid by Simon Dyer, the father. He survived his wife, and lived until 1785, and then died, having made his will, and thereby devised all his interest in these copyhold premises (amongst others) to the plaintiff, his younger son.

The present bill stated these circumstances, and insisted that the whole purchase-money being paid by the father, although, by the form of the grant, the wife and the defendant had the legal interest in the premises for their lives in succession, yet in a court of equity they were but trustees for the father, and the bill therefore prayed that the plaintiff, as devisee of the father, might be quieted in the possession of the premises during the life of the defendant.

The defendant insisted that the insertion of his name

in the grant operated as an advancement to him from his father to the extent of the legal interest thereby given to him. And this was the whole question in the cause.

This case was very fully argued by Mr. *Solicitor-General* and *Ainge*, for the plaintiff; and by *Burton* and *Morris*, for the defendant. The following cases were cited, and very particularly commented on:—*Smith* v. *Baker*, 1 Atk. 385; *Taylor* v. *Taylor*, 1 Atk. 386; *Mumma* v. *Mumma*, 2 Vern. 19; *Howe* v. *Howe*, 1 Vern. 415; *Anon.*, 2 Freem. 123; *Benger* v. *Drew*, 1 P. Wms. 781; *Dickenson* v. *Shaw*, before the Lords Commissioners, in 1770; *Bedwell* v. *Froome*, before Sir *T. Sewell*, on the 10th of May, 1778; *Row* v. *Bowden*, before Sir *L. Kenyon*, sitting for the Lord Chancellor; *Crisp* v. *Pratt*, Cro. Car. 549; *Scroope* v. *Scroope*, 1 Ch. Ca. 27; *Elliot* v. *Elliot*, 2 Ch. Ca. 231; *Ebrand* v. *Dancer*, Ch. Ca. 26; *Kingdon* v. *Bridges*, 2 Vern. 67; *Beek* v. *Andrew*, 2 Vern. 120; *Rundle* v. *Rundle*, 2 Vern. 264; *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111; *Stileman* v. *Ashdown*, 2 Atk. 477; *Pole* v. *Pole*, 1 Ves. 76.

Lord Chief Baron Eyre, after directing the cause to stand over for a few days, delivered the judgment of the Court.

The question between the parties in this cause is, whether the defendant is to be considered as a trustee for his father in respect of his succession to the legal interest of the copyhold premises in question, and whether the plaintiff, as representative of the father, is now entitled to the benefit of that trust. I intimated my opinion of the question on the hearing of the cause; and I then indeed entertained very little doubt upon the rule of a court of equity, as applied to this subject; but as so many cases have been cited, some of which are not in print, we thought it convenient to take an opportunity of looking more fully into them, in order that the ground of our decision may be put in as clear a light as possible, especially in a case in which so great a difference of opinion seems to have prevailed at the bar. And I have met

with a case, in addition to those cited, which is that of *Rumboll* v. *Rumboll* (*a*), on the 20th of April, 1761.

(*a*) Since reported, 2 Eden, 15.

The clear result of all the cases, without a single exception, is, that *the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successivè, results to the man who advances the purchase-money.* This is a general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a court of equity, that this resulting trust may be rebutted by circumstances in evidence.

The cases go one step further, and prove that *the circumstance of one or more of the nominees being a child or children of the purchaser, is to operate by rebutting the resulting trust;* and it has been determined in so many cases, that the nominee, being a child, shall have such operation as a circumstance of evidence, that we should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law. Surely, then, it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must be of course evidence admitted on the other side. Thus, it was resolved into a question of intent, which was getting into a very wide sea, without very certain guides.

In the most simple case of all, which is that of a father purchasing in the name of his son, it is said that this shows that the father intended an advancement; and, therefore, the resulting trust is rebutted; but then a circumstance is added to this, namely, that the son happened to be provided for. Then the question is, did the father intend to advance a son already provided for? Lord *Nottingham* (*a*) could not get over this; and he ruled, that in such a case the resulting trust was not rebutted; and in *Pole* v. *Pole*, 1 Ves. 76, Lord *Hardwicke* thought so too; and yet the rule, in a court of equity, as recognised in other cases, is, that the father is the only judge as to the question of a son's provision; that distinction, therefore, of the son being provided for or not is not very solidly taken or uniformly adhered to (*b*). It is then said, that *a purchase in the name of a son is a primâ facie* advancement (and, indeed, it seems difficult to put it in any other way). In some of the cases, some circumstances have appeared which go pretty much against that presumption: as where the father has entered and kept possession and taken the rents, or where he has surrendered or devised the estate, or where the son has given receipts in the name of the father; the answer given is, that the father took the rents as guardian of his son. Now, would the Court sustain a bill by the son against the father for these rents? I should think it pretty difficult to succeed in such a bill. As to the surrender and devise, it is answered, that these are subsequent acts; whereas the intention of the father in taking the purchase in the son's name must be proved by concomitant acts; yet these are pretty strong acts of ownership, and assert the right and coincide with the possession and enjoyment. As to the son's giving receipts in the name of the father, it is said that the son being under age, he could not give receipts in any other manner; but I own this reasoning does not satisfy me.

In the more complicated cases, where the life of the son is one of the lives to take in succession, other distinctions are taken. If the custom of the manor be, that

(*a*) *Grey* v. *Grey*, 2 Swanst. 600; *S. C.*, Finch, 343; and see *Elliot* v. *Elliot*, 2 Ch. Ca. 231; *Lloyd* v. *Read*, 1 P. Wms. 608.

(*b*) See *Redington* v. *Redington*, 3 Ridg. 190; *Sidmouth* v. *Sidmouth*, 2 Beav. 456.

the first taker might surrender the whole lease, that shall make the other lessees trustees for him; but this custom operates on the legal estate, not on the equitable interest; and, therefore, this is not a very solid argument. When the lessees are to take *successivè*, it is said, that, as the father cannot take the whole in his own name, but must insert other names in the lease, then the children shall be trustees for the father; and, to be sure, if the circumstance of a child being the nominee is not decisive the other way, there is a great deal of weight in this observation. There may be many prudential reasons for putting in the life of a child in preference to that of any other person; and if in that case it is to be collected from circumstances whether an advancement was meant, it will be difficult to find such as will support that idea: to be sure, taking the estate in the name of the child, which the father might have taken in his own, affords a strong argument of such an intent; but where the estate must necessarily be taken to lives in succession, the inference is very different. These are difficulties which occur from considering the purchase in the son's name as a circumstance of evidence only. Now, if it were once laid down that the son was to be taken as a purchaser for a valuable consideration, all these matters of presumption would be avoided.

It must be admitted, that the case of *Dickenson* v. *Shaw* is a case very strong to support the present plaintiff's claim. That came on in Chancery on the 22nd of May, 1770. A copyhold was granted to three lives to take in succession, the father, son, and daughter; the father paid the fine; there was no custom stated; the question was, whether the daughter and her husband were trustees during the life of the son, who survived the father. At the time of the purchase the son was nine, and the daughter seven years old. It appeared that the father had leased the premises from three years to three years to the extent of nine years. On this case, Lords Commissioners *Smythe* and *Aston* were of opinion that, as the father had paid the purchase-money, the children were

trustees for him. To the note I have of this case it is added, that this determination was contrary to the general opinion of the bar, and also to a case of *Taylor* v. *Alston* in this Court. In *Dickenson* v. *Shaw* there was some little evidence to assist the idea of its being a trust, namely, that of the leases made by the father; if that made an ingredient in the determination, then that case is not quite in point to the present; but I rather think that the meaning of the Court was, that the burthen of proof lay on the child; and that the cases, which went the other way, were only those in which the estate was entirely purchased in the names of the children; if so, they certainly were not quite correct in that idea, for there had been cases in which the estates had been taken in the names of the father and son. I have been favoured with a note of *Rumboll* v. *Rumboll* (*a*) before Lord Keeper *Henley* on the 20th of April, 1761, where a copyhold was taken for three lives in succession, the father and two sons; the father paid the fine; and the custom was, that the first taker might dispose of the whole estate (and his Lordship then stated that case fully). Now, this case does not amount to more than an opinion of Lord Keeper *Henley;* but he agreed with me in considering a child as a *purchaser* for good consideration of an estate bought by the father in his name, though a trust would result as against a stranger. It has been supposed that the case of *Taylor* v. *Alston* in this Court denied the authority of *Dickenson* v. *Shaw*. That cause was heard before Lord Chief Baron *Smythe*, myself, and Mr. Baron *Burland*, and was the case of an uncle purchasing in the names of himself and a nephew and niece: it was decided in favour of the nephew and niece, not on any general idea of their taking as relations, but on the result of much parol evidence, which was admitted on both sides; and the equity on the side of the nominees was thought to preponderate. Lord *Kenyon* was in that cause, and his argument went solely on the weight of the parol evidence; indeed, as far as the circumstance of the custom of the first taker's right to surrender, it was a strong case in

(*a*) 2 Eden, 15.

favour of a trust; however, the Court determined the other way on the parol evidence: that case, therefore, is not material. Another case has been mentioned, which is not in print, and which was thought to be materially applicable to this (*Bedwell* v. *Froome*, before Sir *T. Sewell*); but that was materially distinguishable from the present: as far as the general doctrine went, it went against the opinion of the Lords Commissioners. His Honor there held, that the copyholds were part of the testator's personal estate, for that it was not a purchase in the name of the daughter; she was not to have the legal estate; it was only a contract to add the daughter's life in a new lease to be granted to the father himself; there could be no question about her being a trustee; for it was as a freehold in him for his daughter's life; but, in the course of the argument, his Honor stated the common principles as applied to the present case; and ended by saying that, as *between father and child, the natural presumption was, that a provision was meant.* The anonymous case in 2 Freem. 123, corresponds very much with the doctrine laid down by Sir *T. Sewell;* and it observes, that an advancement to a child is considered as done for valuable consideration, not only against the father, but against creditors. *Kingdon* v. *Bridges* is a strong case to this point: that is, the valuable nature of the consideration arising on a provision made for a wife or for a child; for there the question arose as against creditors.

I do not find that there are in print more than three cases which respect copyholds, where the grant is to take *successivè*: *Rundle* v. *Rundle*, 2 Vern. 264, which was a case perfectly clear; *Benger* v. *Drew*, 1 P. Wms. 781, where the purchase was made partly with the wife's money; and *Smith* v. *Baker*, 1 Atk. 385, where the general doctrine, as applied to strangers, was recognized; but the case turned on the question, whether the interest was well devised. Therefore, as far as respects this particular case, *Dickenson* v. *Shaw* is the only case quite in point; and then the question is, whether that case is to be abided by? With great reverence to the memory of

those two judges who decided it, we think that case cannot be followed; that it has not stood the test of time or the opinion of learned men; and Lord *Kenyon* has certainly intimated his opinion against it. On examination of its principles, they seem to rest on too narrow a foundation, namely, that the inference of a provision being intended did not arise, because the purchase could not have been taken wholly in the name of the purchaser. This, we think, is not sufficient to turn the presumption against the child. If it is meant to be a trust, the purchaser must show that intention by a declaration of trust; and we do not think it right to doubt whether an estate in succession is to be considered as an advancement when a moiety of an estate in possession certainly would be so. If we were to enter into all the reasons that might possibly influence the mind of the purchaser, many might perhaps occur in every case upon which it might be argued that an advancement was not intended; and I own it is not a very prudent conduct of a man just married to tie up his property for one child, and preclude himself from providing for the rest of his family; but this applies equally in case of a purchase in the name of the child only. Yet that case is admitted to be an advancement; indeed, if anything, the latter case is rather the strongest, for there it must be confined to one child only. We think, therefore, that these reasons partake of too great a degree of refinement, and should not prevail against a rule of property which is so well established as to become a land-mark, and which, whether right or wrong, should be carried throughout.

This bill must therefore be dismissed; but, after stating that the only case in point on the subject is against our present opinion, it certainly will be proper to dismiss it without costs.

Dyer v. *Dyer* is a leading case on the doctrine of resulting trusts upon purchases made in the names of strangers, but more especially on the very important exception to the doctrine where purchases

are made, not in the names of strangers, but of children or persons equally favoured.

As to purchases made in the names of strangers, the Lord Chief Baron *Eyre* in his judgment observes, "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others, jointly, or in the names of others without that of the purchaser; whether in one name or several, whether jointly or successivè, results to the man who advances the purchase-money; and it goes on a strict analogy to the rule of common law, that, where a feoffment is made without consideration, the use results to the feoffor."

To illustrate this statement of the doctrine, suppose A. advances the purchase-money of a freehold, copyhold, or leasehold estate, and a conveyance, surrender, or assignment of the legal interest in it is made either to B. or to B. and C., or to A., B., and C. jointly, or to A., B., and C. successively. In all these cases, if B. and C. are strangers, a trust will result in favour of A. That a trust results where the conveyance is taken in one name or several jointly, see *Ex parte Houghton*, 17 Ves. 253; *Rider* v. *Kidder*, 10 Ves. 367; or successivè, see *Howe* v. *Howe*, 1 Vern. 415; *Withers* v. *Withers*, Amb. 151; *Smith* v. *Baker*, 1 Atk. 385; and a custom of a manor that a nominee should take beneficially will not hold good, as being unreasonable and contrary to the principles of resulting trusts: *Lewis* v. *Lane*, 2 My. & K. 449, overruling *Edwards* v. *Fidel*, 3 Madd. 237; *Jeans* v. *Cooke*, 24 Beav. 513.

The doctrine is applicable to personal as well as to real estate; and a trust will result for the person advancing the consideration-money who takes a bond or a transfer of stock, or who purchases an annuity or any other thing of a personal nature in the name of a stranger, or of himself jointly with a stranger: see *Ebrand* v. *Dancer*, 2 Ch. Ca. 26; *Mortimer* v. *Davies*, cited *Rider* v. *Kidder*, 10 Ves. 365, 366; *Loyd* v. *Read*, 1 P. Wms. 607; *Ex parte Houghton*, 17 Ves. 253; *Sidmouth* v. *Sidmouth*, 2 Beav. 454; *Garrick* v. *Taylor*, 29 Beav. 79; *Beecher* v. *Major*, 2 Drew. & Sm. 431.

The doctrine of resulting trusts is applicable also to cases where two or more persons advance the purchase-money jointly. Lord *Hardwicke*, indeed, in *Crop* v. *Norton*, Barnard. C. Rep. 184, *S. C.*, 9 Mod. 235, is said to have thought that it was confined to cases where the whole consideration moved from one person. However, in *Wray* v. *Steele*, 2 V. & B. 388, Sir *Thomas Plumer*, V. C., upon the general principle, decided that there was a resulting trust upon a joint advance, where the purchase was taken in the

name of one. "Lord Hardwicke," observed his Honor, "could not have used the language ascribed to him. What is there applicable to an advance by a single individual, that is not equally applicable to a joint advance under similar circumstances?" See *In re Thomas Ryan*, 3 I. R. Eq. 237.

But no trust will result if the policy of an Act of Parliament would be thereby defeated. Thus, it was held that no trust resulted in favour of a person advancing the purchase-money of a ship registered in the name of another; for the register, according to the policy of the old Registry Acts, was conclusive evidence of ownership, both at law and in equity. "The Registry Acts," says Lord *Eldon*, "were drawn upon this policy; that it is for the public interest to secure evidence of the title to a ship, from her origin to the moment in which you look back to her history; how far throughout her existence she has been *British* built and *British* owned; and it is obvious, that, if where the title arises by act of the parties, the doctrine of implied trust in this Court is to be applied, the whole policy of these acts may be defeated:" *Ex parte Yallop*, 15 Ves. 68; see also *Ex parte Houghton*, 17 Ves. 251; *Slater* v. *Willis*, 1 Beav. 354. See and consider *Armstrong* v. *Armstrong*, 21 Beav. 71, 78. See the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, amended by 25 & 26 Vict. c. 63), whereby, after enacting that not more than thirty-two individuals shall be entitled to be registered at the same time as owners of any one ship, it is provided, "but this rule shall not affect the beneficial title of any numbers of persons or of any company represented by or claiming under or through any registered owner or joint owner." Sect. 37 (2).

Where, however, a person having no title to a ship procures it to be registered in his name, the Court of Chancery will compel him to re-transfer it to the rightful owner and account for the earnings, even though there have been no fraud, and notwithstanding the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104): *Holderness* v. *Lamport*, 29 Beav. 129. As to the effect of non-registration of the mortgage of a ship, see *Keith* v. *Burrows*, 1 C. P. D. 722, 731.

The principle upon which the case of *Ex parte Yallop* proceeds seems to have been lost sight of in the case of *Field* v. *Lonsdale* (13 Beav. 78). There a person having deposited moneys in his own name in a savings bank to the full extent allowed by Act of Parliament (9 Geo. 4, c. 92), made further deposits to an account in his own name "in trust for" his sister, but no notice of the investment was given to her. By the terms of the Act he retained a control over the whole fund. It was held by Lord *Langdale*, M. R.,

on the death of the depositor, that his sister was not entitled. "I think," said his Lordship, "that the only intention was to *evade* the provisions of the Act of Parliament, and not to create a trust. The declaration is therefore ineffectual, and the claim must be dismissed."

A trust will not, it seems, result in favour of a person who has purchased an estate in the name of another in order to give him a vote in electing a member of Parliament: *Groves* v. *Groves*, 3 Y. & J. 163, 175. See also *Brackenbury* v. *Brackenbury*, 2 J. & W. 391.

It has been held that a trust will result in favour of a person who has purchased lands in New South Wales in the name of a third party, as such transaction is neither immoral nor contrary to public policy, nor to the spirit and policy of the New South Wales Crown Lands Alienation Act, 1861: *Barton* v. *Muir*, 6 L. R. P. C. S. 134.

If the advance of the purchase-money by the real purchaser does not appear on the face of the deed, and even if it is stated to have been made by the nominal purchaser, parol evidence is admissible to prove by whom it was actually made. Thus, in *Sir John Peachey's case*, Rolls, E. T., 1759, M.S., Sugd. V. & P. 910, 11th edit., Sir *Thomas Clarke*, M. R., laid it down, that if A. sold an estate to C., and *the consideration was expressed to be paid by B.*, and the conveyance made to B., the Court would allow parol evidence to prove the money paid by C.; see also *Ryall* v. *Ryall*, 1 Atk. 59; *S. C.*, Amb. 413; *Willis* v. *Willis*, 2 Atk. 71; *Bartlett* v. *Pickersgill*, 1 Eden, 516; *Lane* v. *Dighton*, Amb. 409; *Groves* v. *Groves*, 3 Y. & J. 163. We may, therefore, consider that these authorities overrule *Kirk* v. *Webb*, Prec. Ch. 84; *Heron* v. *Heron*, Prec. Ch. 163, and other older cases in which it was held that parol evidence could not be admitted to prove payment of purchase-money so as to raise a resulting trust, on the ground, that the admission of such evidence would be contrary to the Statute of Frauds (29 Car. 2, c. 3): for the trust which results to the person paying the purchase-money and taking a conveyance in the name of another, is a trust resulting by operation of law, and trusts of that nature are expressly excepted from the statute. See 29 Car. 2, c. 3, s. 8.

Where the trust does not arise on the face of the deed itself, the parol evidence must prove the fact of the advance of the purchase-money very clearly: *Newton* v. *Preston*, Prec. Ch. 103; *Gascoigne* v. *Thwing*, 1 Vern. 366; *Willis* v. *Willis*, 2 Atk. 71; *Goodright* v. *Hodges*, 1 Watk. Cop. 229; *Groves* v. *Groves*, 3 Y. & J. 163. Lord *Hardwicke*, however, in *Willis* v. *Willis*, 2 Atk. 72, thought that parol evidence might be ad-

mitted to show the trust from the mean circumstances of the pretended owner of the real estate or inheritance, which made it impossible for him to be purchaser. See, also, *Lench* v. *Lench*, 10 Ves. 518; *Heard* v. *Pilley*, 4 L. R. Ch. App. 552.

It is said by Mr. Sanders, in his Treatise on Uses and Trusts, Vol. I., p. 354, 5th edit., "that, after the death of the supposed nominal purchaser, parol proof can in no instance be admitted against the express declaration of the deed." The same opinion is expressed by another author. See Roberts on Frauds, 99, and *Chalk* v. *Danvers*, 1 Ch. Ca. 310. It does not, however, appear that the Statute of Frauds is violated by admitting parol proof of the advance of the purchase-money after the death of the nominal purchaser, any more than it is by allowing such proof in his lifetime. See *Lench* v. *Lench*, 10 Ves. 511, 517; Sugd. V. & P. 910, 11th edit.

If the nominal purchaser admits the payment of the purchase-money by the real purchaser, a trust will doubtless result: *Ryall* v. *Ryall*, 1 Atk. 58; *Lane* v. *Dighton*, Amb. 413; and even although he, by answer to a bill, denied such payment, parol evidence was, it appears, admissible in contradiction to it. See *Gascoigne* v. *Thwing*, 1 Vern. 366; *Newton* v. *Preston*, Prec. Ch. 103; *Bartlett* v. *Pickersgill*, 1 Eden, 515, 516; *Edwards* v. *Pike*, 1 Eden, 267; *Cooth* v. *Jackson*, 6 Ves. 39; sed vide *Skelt* v. *Whitmore*, 2 Freem. 280.

But parol evidence has been held not admissible to prove a verbal agreement of an agent to purchase an estate for his principal, where the agent having purchased the estate for himself, *with his own money*, had, by his answer, denied the agreement. See *Bartlett* v. *Pickersgill*, 1 Eden, 515, where Lord Keeper *Henley*, clearly drawing the distinction between the admission of evidence to prove the advance of purchase-money, where the trusts result by operation of the law, and are exempted from the Statute of Frauds (29 Car. 2, c. 3), and the admission of parol evidence to prove an agreement, said, that to allow parol evidence in the latter case would be to overturn the statute. "The statute," observes his Lordship, "says that there shall be no trust of land unless by memorandum in writing, *except such trusts as arise by operation of law*. Where money is actually paid, there the trust arises from the payment of the money, and *not from any agreement of the parties*. But this is not like the case of money paid by one man, and the conveyance taken in the name of another; in that case, the bill charges that the estate was bought with the plaintiff's money. If the defendant says he borrowed it of the plaintiff, then the proof will be whether the

money was lent or not; if it was not lent, the plaintiff bought the land: but as *here the trust depends on the agreement*, if I establish the one by parol, I establish the other also . . . . *If the plaintiff had paid any part of the purchase-money, it would have been a reason for me to admit the evidence.*" The defendant in this case was afterwards convicted of perjury for having denied the trust; but the record of the conviction was held not to be evidence of the agreement: *Bartlett* v. *Pickersgill*, 1 Eden, 517; see *Chadwick* v. *Maden*, 9 Hare, 188.

In the recent case of *Heard* v. *Pilley*, 4 L. R. Ch. App. 548, doubts are thrown upon *Bartlett* v. *Pickersgill*, by Lords Justices *Selwyn* and *Giffard*, the latter of whom observes, "that, as regards the case of *Bartlett* v. *Pickersgill*, it seems to be inconsistent with all the authorities of the Court, which proceed on the footing that it will not allow the Statute of Frauds to be made an instrument of fraud." See *Nicholson* v. *Mulligan*, 3 I. R. Eq. 308.

Parol evidence is admissible to prove that a purchase has been made with trust-money; and upon that being proved, a trust will result in favour of the cestui que trust, the real owner of the money. Thus, Sir *William Grant*, M. R., in *Lench* v. *Lench*, 10 Ves. 517, speaking of a purchase alleged to have been made with trust-money, says, "all depends upon the proof of the facts; for, whatever doubts may have been formerly entertained upon this subject, it is now settled that money may, in this manner, be followed into the land in which it is invested; and a claim of this sort may be supported by parol evidence." See also *Anon.*, Sel. Ch. Ca. 57; *Ryall* v. *Ryall*, 1 Atk. 59; *S. C.*, Amb. 413; *Lane* v. *Dighton*, Amb. 409; *Balgney* v. *Hamilton*, cited Amb. 414; *Hughes* v. *Wells*, 9 Hare, 749; *Harford* v. *Lloyd*, 20 Beav. 310; *Bridgman* v. *Gill*, 24 Beav. 302; *Birds* v. *Askey*, 24 Beav. 618; *Pennell* v. *Deffell*, 4 De G. Mac. & G. 372; *Trench* v. *Harrison*, 17 Sim. 111; *Wadham* v. *Rigg*, 1 Drew. & Sm. 216; *Williams* v. *Thomas*, Ib. (V.-C. K.) 417; *Rolfe* v. *Gregory*, 13 W. R. (L. C.) 355; *Frith* v. *Cartland*, 2 Hem. & Mill. 417; *Hopper* v. *Conyers*, 2 L. Rep. Eq. 549; *Brown* v. *Adams*, 4 L. R. Ch. App. 764; *Great Eastern Railway Company* v. *Turner*, 8 L. R. Ch. App. 149; *Ex parte Cooke*, 4 Ch. D. 123.

Where a person under an obligation to settle all his personal estate afterwards buys land in his own name, partly with borrowed money, although upon his death intestate there will be no resulting trust of the estate which will descend to his heir, all his personal estate which can be traced as having been employed in the purchase of the estate, in paying

off the borrowed money, or in lasting improvements on the estate, will be a charge upon it in the hands of the heir for the benefit of the cestui que trusts: *Lewis* v. *Madocks*, 8 Ves. 150; 17 Ves. 48; *Denton* v. *Davies*, 18 Ves. 499.

No trust will result for a person who advances the purchase-money merely as a loan: *Bartlett* v. *Pickersgill*, 1 Eden, 516; *Crop* v. *Norton*, 9 Mod. 233, 235; *Aveling* v. *Knipe*, 19 Ves. 445.

It was recently stated by Sir *G. Jessel*, M. R., that "he did not understand that the law of the Court made any difference between a transfer and a purchase—a purchase of stock in the joint names of the beneficial owner and another, or a transfer from that beneficial owner into the joint names of himself or herself [and another], or a transfer to a third name from the beneficial owner into another name. In either case, in the absence of evidence to the contrary, there was a resulting trust in favour of the beneficial owner." *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 345, n. In the Court of Appeal, where the decision of the Master of the Rolls was reversed, upon the admission of evidence rebutting the resulting trust, if any, the Lords Justices did not decide the point raised by the Master of the Rolls, viz., whether a trust results upon the transfer of stock from the owner into the name of a third party, in the same manner as it undoubtedly would do if he had purchased stock and had it transferred by another into the name of such person. But Lord Justice *James*, although he assumed for the purpose of his judgment that there was no distinction between the two cases, evidently did not agree with the law as laid down by the Master of the Rolls, as he observed, although he would then assume that the implication of a resulting trust arose as much in the case of a transfer as in that of a purchase of stock, "that certainly was not the case with regard to a conveyance of land:" *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 348.

With regard to a voluntary conveyance of land, in the case of *Young* v. *Peachy*, 2 Atk. 257, Lord *Hardwicke* distinctly lays it down that where a voluntary conveyance is made, it is by no means the rule of the Court that a trust arises by implication. That trusts by implication or operation of law arise where one person pays the purchase-money and the conveyance is taken in the name of another, or in some other cases of that kind, but the rule is by no means so large as to extend to every voluntary conveyance. See also *Lloyd* v. *Spillet*, 2 Atk. 148, 150. *Sed vide* Lewin on Trustees, p. 127, 6th ed., and cases there cited; *Fordyce* v. *Willis*, 3 Bro. C. C. 585.

Upon the same principle, in

George v. *Howard*, 7 Price, 646, where an intestate had transferred stock into the joint names of himself and the husband of one of his nieces, Lord Chief Baron *Richards* says, "It was argued on this ground, that the intestate having purchased the stock with his own money, and transferred it into his own name and that of another person, the presumption is that the other person, if a stranger, is merely a trustee for him whose money it was: and so it might have been presumed here, perhaps, if such were the facts, but in this case, stock *already purchased and invested* was transferred into the name of the owner and the defendant; and if I deliver over money, or transfer stock to another, even although he should be a stranger, it would be *primâ facie* a gift."

We may therefore conclude that if there has been a voluntary grant or transfer of real or personal property to a stranger, and *à fortiori* if to a child or a person to whom the grantor or transferor stands in loco parentis (*Batstone* v. *Salter*, 19 L. R. Eq. 250; 10 L. R. Ch. App. 431) the presumption arises that a gift was intended to the grantee or transferee, which may, however, be rebutted or supported by evidence: *Hutchins* v. *Lee*, 1 Atk. 447; *Cook* v. *Fountain*, 3 Swans. 585; *Young* v. *Peachy*, 2 Atk. 256; and see Hill on Trustees, 72, 73.

How resulting trusts may be rebutted.]—Resulting trusts, however, as they arise from equitable presumption, may be rebutted by parol evidence, showing it was the intention of the person who advanced the purchase-money, and which intention cannot be altered at a subsequent period (*Groves* v. *Groves*, 3 Y. & J. 172), that the person to whom the property was transferred either solely or jointly with such person should take for his own benefit (*Goodright* v. *Hodges*, 1 Watk. Cop. 227; *S. C.*, Lofft, 230; *Rider* v. *Kidder*, 10 Ves. 364; *Rundle* v. *Rundle*, 2 Vern. 252; see Order, n. (1) Ib.; *Redington* v. *Redington*, 3 Ridg. P. C. 178; *Deacon* v. *Colquhoun*, 2 Drew. 21; *Garrick* v. *Taylor*, 29 Beav. 79, 10 W. R. (L. J.) 49; *Wheeler* v. *Smith*, 1 Giff. 300; *Nicholson* v. *Mulligan*, 3 I. R. Eq. 308; *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 343); and they may be rebutted as to part, and prevail as to the remainder. Thus, where a person has advanced the purchase-money, and has taken a transfer of stock or the conveyance of an estate in the name of a stranger, upon proof of the intention of the person advancing the money to confer upon the nominee a life interest in the stock or estate, the resulting trust will be rebutted as to the life interest, but will prevail as to the remainder: *Lane* v. *Dighton*, Amb. 409; *Rider* v. *Kidder*, 10 Ves. 368;

Benbow v. *Townsend*, 1 My. & K. 501.

In the same manner the resulting trust may prevail as to a life interest, but be rebutted as to the remainder. This is often the case when a purchase of stock has been made by the purchaser in the joint names of himself and a stranger: *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 343.

Where a transfer has been made to the name of a stranger, or a purchase made in his name, either solely or jointly with that of the purchaser or transferors, and the presumption in favour of a resulting trust is either wholly or partially rebutted by evidence, any subsequent purchase or transfer in the same name or names will be considered as made for the same purpose. See *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 354, where *Mellish*, L. J., observes, "Assuming the testatrix to know that she had made a gift, and had invested a sum of money in stock in the joint names of herself and Pascoe, for the purpose of making a present to him, it would certainly be a very extraordinary thing that she should go and add other large sums to that account, not for the purpose of making a present to him, but for the purpose of his being a trustee."

The mere receipt of the income of the property transferred is not of itself sufficient to show that the transferor did not intend to confer a beneficial interest on the transferees: *George* v. *Howard*, 7 Price, 646; *Christy* v. *Courtenay*, 13 Beav. 96; *Batstone* v. *Salter*, 19 L. R. Eq. 250, 10 L. R. Ch. App. 431.

It seems that statements on the part of the person making the purchase, evidencing an intention to confer some undefined benefit not shown to be acted on, and à fortiori if they are inconsistent with the acts of enjoyment of the property, will not be sufficient to rebut a resulting trust: *Nicholson* v. *Mulligan*, 3 I. R. Eq. 308, 323.

Parol evidence of interested parties is admissible to rebut a resulting trust, and in connection with surrounding circumstances it might have that effect, although it would not if taken by itself. See *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 343. There a lady of considerable fortune, having no nearer connections than the defendant, Mr. Pascoe, then a young man living in her house, and for whom she was providing, bought a sum of 250*l.* stock in the joint names of herself and him, and on the same day bought another sum of 250*l.* stock in the joint names of herself and a lady who was living with her as a companion, she having in her own name at the same time 4000*l.* or 5000*l.* of the same stock. Subsequently she, from time to time, by transfer and purchases, increased the stock of 250*l.* standing in the joint names of herself and Pascoe

to 7000*l.* Pascoe deposed that the 7000*l.* was intended as a gift to him, and his evidence was supported by that of his wife, and of two servants. Upon the case coming before Sir *G. Jessel*, M. R., his Honor held that the evidence standing alone was not sufficient to rebut the presumption of a resulting trust (see 10 L. R. Ch. App. 345 n.). It was held, however, by the Lords Justices, reversing the decision of the Master of the Rolls, that the evidence ought to be taken into consideration in connection with the surrounding circumstances, and that in connection with them it was sufficient to rebut the resulting trust. "The Master of the Rolls," said *Mellish*, L. J., "appears to have thought that because the presumption that it was a trust and not a gift must prevail if there were *no* evidence to rebut the presumption, he ought not to consider the probability or improbability of the circumstances of the case, and whether the presumption was really true or not, but ought to decide the case on the ground that the evidence of Pascoe and his wife *taken alone* was not satisfactory. But in my opinion, when there is once evidence to rebut the presumption, the Court is put in the same position as a jury would be, and then we cannot give such influence to the presumption in point of law, as to disregard the circumstances of the investment, and to say that neither the circumstances nor the evidence are sufficient to rebut the presumption. Now, the presumption must, beyond all question, be of very different weight in different cases. In some cases it would be very strong indeed. If, for instance, a man invested a sum of stock in the name of himself and his solicitor, the inference would be very strong indeed that it was intended solely for the purpose of a trust, and the Court would require very strong evidence on the part of the solicitor to prove that it was intended as a gift; and certainly his own evidence would not be sufficient. On the other hand, a man may make an investment of stock in the name of himself and some person, although not a child or wife, yet in such a position to him as to make it extremely probable that the investment was intended as a gift. In such a case, although the rule of law, *if there was no evidence at all*, would compel the Court to say that the presumption of trust must prevail, even if the Court might not believe that the fact was in accordance with the presumption, yet if there is evidence to rebut the presumption, then, in my opinion, the Court must go into the actual facts. . . . . Applying one's common sense to the transaction, what inference is it possible to draw, except that the purchases of 250*l.* and 250*l.* stock were intended for the purpose of

gifts? If they were intended for the purpose of trusts, what possible reason was there why the two sums were not invested in the same names? Besides, at the very same time, the lady had a large sum of stock in her own name, and could anything be more absurd than to suppose that a lady with 4000*l.* or 5000*l.* in her own name at that time in the same stock, and having a sum of 500*l.* to invest out of her savings, should go and invest 250*l.* in the name of herself and a young gentleman who was living in her house, and another 250*l.* in the name of herself and her companion, and yet intend the whole of it to be for herself? I cannot come to any other conclusion than that it must have been intended by way of a present after her death. Then, when we have once arrived at the conclusion that the first investment was intended as a gift (and the second was exactly similar), and when we find that the account was opened for the purpose of gift, those facts appear to me to rebut the presumption altogether, because when an account is once found to be opened for the purpose of gift, there is very strong reason to suppose that everything added to that account was intended for the purpose of gift also."

The presumption of a resulting trust will not be raised, after acquiescence for a great length of time in the enjoyment of the property, by the person in whose name it was purchased by the person advancing the purchase-money. *Delane* v. *Delane*, 7 Bro. P. C. 279, Toml. ed. See, also, *Groves* v. *Groves*, 3 Y. & J. 172; *Clegg* v. *Edmondson*, 8 De G. Mac. & G. 787.

Where there is an express trust declared, upon a purchase made in the names of strangers, (*Ayerst* v. *Jenkins*, 16 L. R. Eq. 275), though but by parol, there can be no resulting trust; for resulting trusts, though saved by the Statute of Frauds (29 Car. 2, c. 3), are only saved and left as they were before the act; and a bare declaration by parol, before the act, would prevent any resulting trust. See *Bellasis* v. *Compton*, 2 Vern. 294.

Where a person in order to defraud his creditors had transferred stock to a fictitious person, upon proof of the fact, a transfer was ordered to be made to the personal representatives of the transferor (*Arthur* v. *Midland Railway Co.*, 3 K. & J. 204); and in a case where a person had made a similar transfer with the same object, and afterwards became bankrupt, a re-transfer at the suit of his assignees was ordered to be made into his own name: *Green* v. *The Bank of England*, 3 Y. & C. 722.

Presumption of Advancement.] —As to purchases made in the

names of children, or of persons equally favoured, it may be laid down as a general rule that where a purchase is made by a parent in the name of a child, there will primâ facie be no resulting trust for the parent, but on the contrary, *a presumption arises that an advancement was intended.* "I remember," says Lord *Eldon*, "the case of *Dyer* v. *Dyer*, which was very fully considered; and the Court meant to establish this principle, viz., admitting the clear rule that, where A. purchases in the name of B., A. paying the consideration, B. is a trustee, notwithstanding the Statute of Frauds (29 Car. 2, c. 3), that rule does not obtain where the purchase is in the name of a son; that purchase is an advancement primâ facie; and in this sense, that this principle of law and presumption is not to be frittered away by nice refinements. Therefore, if the purchase was of a fee simple immediately, primâ facie the son would take; so, if it was the purchase of a reversion; and it is very difficult, upon the mere circumstance of the proximity or possible remoteness of possession, to do that away. Nothing could be stronger than the circumstance in *Dyer* v. *Dyer*, that the purchaser had actually devised it. He certainly took it to be his own; but he happened to mistake the rule: *Finch* v. *Finch*, 15 Ves. 50; see also *Franklin* v. *Franklin*, 1 Swanst. 17, 18; *Grey* v. *Grey*, 2 Swanst. 597; *S. C.*, Rep. t. Finch, 340; *Sidmouth* v. *Sidmouth*, 2 Beav. 454; *Christy* v. *Courtenay*, 13 Beav. 96; *Williams* v. *Williams*, 32 Beav. 370; *Tucker* v. *Burrow*, 2 Hem. & Mill. 515, 524; and see *Keats* v. *Hewer*, 13 W. R. (LL.J.) 34, where, however, it was held that there was an express trust for the purchaser.

The presumption may also arise in favour of any person with regard to whom the person advancing the money has placed himself in loco parentis: thus in *Beckford* v. *Beckford*, Lofft. 490, an illegitimate son; in *Ebrand* v. *Dancer*, 2 Ch. Ca. 26, a grandchild; and in *Currant* v. *Jago*, 1 Coll. 261, the nephew of a wife, were held entitled to property purchased in their names, from the presumption of *advancement* being intended.

But it has been held in a recent case that the mere fact that a grandfather has placed himself in loco parentis towards his illegitimate grandson during the life of his father, will not of itself alone raise a presumption that a purchase in the name of such illegitimate grandson was intended for his advancement: *Tucker* v. *Burrow*, 2 Hem. & Mill. 515; and see *Forrest* v. *Forrest*, 13 W. R. (V.-C. S.) 380.

The presumption also arises upon the purchase in the name of a wife: (*Kingdon* v. *Bridges*, 2 Vern. 67; *Christ's Hospital* v.

Budgin, 2 Vern. 683; *Back* v. *Andrew*, 2 Vern. 120; *Glaister* v. *Glaister*, 8 Ves. 199; *Rider* v. *Kidder*, 10 Ves. 367; and *Lorimer* v. *Lorimer*, 10 Ves. 367, n.; *Low* v. *Carter*, 1 Beav. 426; and see *Gosling* v. *Gosling*, 3 Drew. 335); or when there is a purchase by a husband in the joint names of himself and his wife: (*Re Gadbury*, 11 W. R. (V.-C. K.) 395; *Lloyd* v. *Pughe*, 14 L. R. Eq. 241; 8 L. R. Ch. App. 88); or in the joint names of himself and his wife and child: *Devoy* v. *Devoy*, 3 Sm. & Giff. 403.

But the presumption does not arise when the purchaser makes the purchase in the names of himself and a woman with whom he was cohabiting or with whom he had gone through the mere form of marriage, as in the case of a marriage with a deceased wife's sister after the passing of the Act to render certain marriages valid, and to alter the law with respect to certain voidable marriages (5 & 6 Will. 4, c. 54): *Soar* v. *Foster*, 4 K. & J. 152.

It seems the presumption of advancement will not arise from the mere purchase by a married woman out of her separate estate in the names of her children, because a married woman is under no legal obligation to provide for her children: *Re De Visme*, 2 De G. Jo. & Sm. 17. But it has been held upon proof of the intention to advance by a married woman making a purchase out of her separate estate in the name of her niece, that the latter was absolutely entitled to the property so purchased; *Beecher* v. *Major*, 2 Drew. & Sm. 431, 13 W. R. (L. C.) 1054.

A widowed mother is, it seems, a person standing in such a relation to her child as to raise the presumption in favour of her child. See *Sayre* v. *Hughes*, 5 L. R. Eq. 576; there Susannah Barling, widow, after making her will in favour of her two daughters, transferred East India Stock which had stood in her own name, into the names of herself and her unmarried daughter, and died. It was held by Sir *John Stuart*, V.-C., that there was a presumption of intended benefit to the unmarried daughter, which was unrebutted, and that the stock belonged absolutely to her. "It has been argued," said his Honor, "that a mother is not a person bound to make an advancement to her child, and that a widowed mother is not a person standing in such a relation to her child as to raise a presumption that in a transaction of this kind a benefit was intended for the child. But the case of a stranger who stands in loco parentis seems not so strong as that of a mother. In the case *Re De Visme* (2 De G. Jo. & S. 17), it was said that a mother does not stand in such a relationship to a child as to raise a presumption of benefit for the child. The question in that case arose on a peti-

tion in lunacy, and it seems to have been taken for granted that no presumption of benefit arises in the case of a mother. But maternal affection, as a motive of bounty, is, perhaps, the strongest of all, although the duty is not so strong as in the case of a father, inasmuch as it is the duty of a father to advance his child. That, however, is a moral obligation and not a legal one. In *Dyer* v. *Dyer*, Eyre, C. B., shewed that the relationship between parent and child is only a circumstance of evidence. . . . The word 'father' does not occur in Lord Chief Baron *Eyre's* judgment, and it is not easy to understand why a mother should be presumed to be less disposed to benefit her child in a transaction of this kind than a father."

Where a contract is entered into to purchase real property in the name of a wife or child, although the wife or child as volunteers could not file a Bill for specific performance of the contract, nevertheless if the vendor enforces, or is entitled to payment out of the husband's estate, the conveyance must be made to the wife or child. *Redington* v. *Redington*, 3 Ridg. P. C. 106; *Skidmore* v. *Bradford*, 8 L. R. Eq. 134; *Nicholson* v. *Mulligan*, 3 I. R. Eq. 308; and see *Drew* v. *Martin*, 2 Hem. & Mill. 130. There an agreement for the purchase of land was entered into in the names of the husband and wife, and the husband died before the whole of the purchase-money was paid. Upon an inquiry in an administration suit as to the real property of the husband, it was held by Sir *W. Page Wood*, V.-C., that it did not include the purchased estate, that the purchase enured for the benefit of the widow, and that the unpaid purchase-money was payable out of the husband's personal estate. But see now Locke King's Act Amendment (30 & 31 Vict. c. 69).

A binding contract to purchase in the joint names of a man and his wife, has been held to entitle the wife to the benefit of the purchase as survivor: thus in *Vance* v. *Vance*, 1 Beav. 605, A. B. gave directions to his bankers to invest a sum of money in the joint names of himself and his wife, and their brokers accordingly made the purchase. A. B. died after the contract, but before the transfer had been completed. It was held by Lord *Langdale*, M. R., that the wife was entitled to the stock by survivorship. See also *Bailey* v. *Collett*, 18 Beav. 181; *Harrison* v. *Asher*, 12 Jur. 834; 2 De G. & Sm. 436.

The presumption of advancement also arises in the case of personal as well as of real property. As, for instance, where a person purchases stock, and causes it to be transferred into the name of his child or wife: *Crabb* v. *Crabb*, 1 My. & K. 511; *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Bone* v.

Pollard, 24 Beav. 283; *Lorimer* v. *Lorimer*, 10 Ves. 367, n.; *Hepworth* v. *Hepworth*, 11 L. R. Eq. 10; *Fox* v. *Fox*, 15 Ir. Ch. Rep. 89. Also where a husband takes a deposit receipt at a bank in the names of himself and his wife, or alters a deposit receipt from his own name to the names of himself and his wife. *Talbot* v. *Cody*, 10 I. R. Eq. 138, 146; *Gosling* v. *Gosling*, 3 Drew. 335. So, also, in *Ebrand* v. *Dancer*, 2 Ch. Ca. 26, a grandfather took bonds in the names of his infant grandchildren. The Lord Chancellor, considering that the grandfather was in loco parentis (the father being dead), said, "The grandchildren are in the immediate care of the grandfather; and if he take bonds in their names, or make leases to them, it shall not be judged a trust, but a provision for the grandchildren, unless it be otherwise declared at the same time;" and decreed accordingly on that reason, though there were other matters.

And it seems if a father effects a policy of assurance on the life of his son, a presumption would, in the absence of evidence to the contrary, arise, that he intended it to be for his son's benefit. See *Worthington* v. *Curtis*, 1 Ch. D. 419, 423, in which case, however, the evidence showed that the father effected the policy for his own benefit.

Where a father of a family, upon a purchase of an estate being made by the trustees of his marriage settlements, pays them a further sum in order to enable them to complete such purchase, it will be presumed that he did so for the benefit of all persons interested under the settlements. *Ouseley* v. *Anstruther*, 10 Beav. 461; *In re Curteis' Trusts*, 14 L. R. Eq. 217.

Admission of evidence to rebut or in support of the presumption of advancement.]—Many circumstances of evidence have been taken into consideration by different equity Judges, as rebutting the presumption of advancement, which have given rise to many nice distinctions, not very easy to be understood; most of them, however, are now disregarded. Thus, at one time, it was thought that the *infancy* of a child, in whose name a purchase was made, was a circumstance against its being considered an advancement; it is now, however, considered a strong circumstance in favour of advancement being intended; as in *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111, where a father made a purchase in the name of an infant eight years old, Lord *Cowper* held, that, "the son, being but eight years old, was unfit for a trustee, and must be intended to be named for his own benefit." See also *Mumma* v. *Mumma*, 2 Vern. 19; *Finch* v. *Finch*, 15 Ves. 43. And it is clear, that the argument against advance-

ment being intended, from the circumstance of the property purchased by the parent being reversionary, and therefore not a proper provision for the child, will not prevail, although it has formerly been entertained: *Rumboll* v. *Rumboll*, 2 Eden, 17; *Finch* v. *Finch*, 15 Ves. 43; *Murless* v. *Franklin*, 1 Swanst. 13; *Williams* v. *Williams*, 32 Beav. 378; and see *Pilsworth* v. *Mosse*, 14 Ir. Ch. Rep. 163.

The purchase by a parent in the *joint names* of himself and his son, has been objected to by Lord *Hardwicke*, as a weaker case for advancement than a purchase in the name of the son alone: *Pole* v. *Pole*, 1 Ves. 76; and in *Stileman* v. *Ashdown*, 2 Atk. 480, he said that it did not answer the purposes of advancement, as it entitled the father to the possession of the whole till a division, besides the father taking a chance to himself of being a survivor of the other moiety; nay, if the son had died during his minority, the father would have been entitled to the whole, by virtue of the survivorship; and the son could not have prevented it by severance, he being an infant. And, moreover, that the father might have other reasons for purchasing in jointtenancy, namely, to prevent dower upon the estate, and other charges. It seems, however, clear, that, at the present day, the objections of Lord *Hardwicke* would have little or no weight; for it has been repeatedly held, both in the old and modern cases, that a purchase by a parent in the joint names of himself and his child, as well as a purchase in the joint names of the child and a stranger, will be held an advancement for the child to the extent of the interest vested in him. See *Scroope* v. *Scroope*, 1 Ch. Ca. 27; *Back* v. *Andrew*, 2 Vern. 120; *Grey* v. *Grey*, 2 Swanst. 599; *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111; *Crabb* v. *Crabb*, 1 My. & K. 511; *Dummer* v. *Pitcher*, 2 My. & K. 272; *Fox* v. *Fox*, 15 Ir. Ch. Rep. 89. A stranger, however, taking jointly with the child, must hold the estate vested in him in trust for the parent: *Kingdon* v. *Bridges*, 2 Vern. 67; *Rumboll* v. *Rumboll*, 1 Eden, 17.

The principal case, overruling *Shaw* v. *Dickenson* (*ante*, p. 227, cited), decides that a grant of copyholds, taken by a father in the names of himself and his sons, will be an advancement for the sons, although, according to the custom of the manor, grants were made for lives successivè. See *Murless* v. *Franklin*, 1 Swanst. 13; *Finch* v. *Finch*, 15 Ves. 43; *Skeats* v. *Skeats*, 2 Y. & C. C. C. 9; *Jeans* v. *Cooke*, 24 Beav. 513, decided upon the authority of the principal case.

Another circumstance, which has been considered as an objection against the presumption of advancement, is, that the child has been already *fully advanced:*

in that case he *may*, it seems, be held a trustee for the father. See *Elliot* v. *Elliot*, 2 Ch. Ca. 231; *Pole* v. *Pole*, 1 Ves. 76; *Grey* v. *Grey*, 2 Swanst. 600; *Loyd* v. *Read*, 1 P. Wms. 608; *Redington* v. *Redington*, 3 Ridg. P. C. 190. The observation, however, of the Lord Chief Baron, in the principal case, would, at the present day, probably be considered a sufficient answer to such an objection to the presumption of advancement. "The rule of equity," observes his Lordship, "as recognised in other cases, is, that the father is the only judge on the question of a son's provision; and therefore the distinction of the son's being provided for or not, is not very solidly taken." See *Redington* v. *Redington*, 3 Ridg. P. C. 190. And in *Sidmouth* v. *Sidmouth*, 2 Beav. 456, where it was argued that, as the son was adult, he ought to be considered as provided for, and therefore a trustee for his father, Lord *Langdale* held that circumstance to be of no weight. "The circumstance," said his Lordship, "that the son was adult, does not appear to me to be material. It is said that no establishment was in contemplation, and that no necessity or occasion for advancing the son had occurred; but in the relation between parent and child, it does not appear to me that any observation of this kind can have any weight. The parent may judge for himself when it suits his own convenience, or when it will be best for his son, to secure him any benefit which he voluntarily thinks fit to bestow upon him; and it does not follow, that, because the reason for doing it is not known, there was no intention to advance at all." See also *Hepworth* v. *Hepworth*, 11 L. R. Eq. 10.

If a child is advanced but *in part* no implication against advancement arises: *Redington* v. *Redington*, 3 Ridg. P. C. 106. And a child will not be considered as advanced who has only a reversionary estate: *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111.

Another circumstance is mentioned in the principal case, as going against the presumption of advancement, viz., the father's entering into, and keeping possession, and taking the rents and profits of the purchased property, or the son's giving receipts in the name of the father: in such case, if the son is an *infant*, the presumption of advancement will not be rebutted, as the acts of the father, it is said, may be referable to his duty as guardian of his son, and not to an assumption of ownership: *Loyd* v. *Read*, 1 P. Wms. 608; *Mumma* v. *Mumma*, 2 Vern. 19; *Alleyne* v. *Alleyne*, 2 J. & L. 544; *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111; *Stileman* v. *Ashdown*, 2 Atk. 480; *Taylor* v. *Taylor*, 1 Atk. 386; *George's case*, cited 2 Swanst. 600; and see *Devoy* v. *Devoy*, 3 Sm. & Giff.

403; *Fox* v. *Fox*, 15 Ir. Ch. Rep. 89.

The Lord Chief Baron, however, in the principal case, expresses himself dissatisfied with the reasoning which refers those acts of the father to his guardianship; and in *Grey* v. *Grey*, 2 Swanst. 600, Lord *Nottingham* observed, that, "plainly, the reason of the resolution stands not upon the guardianship, but upon the presumptive advancement."

Even where the son is *adult*, it seems that similar acts of ownership by the father will not prevent the presumption of advancement from arising, especially where the son is *advanced but in part*. A leading authority on this subject is *Grey* v. *Grey*, 2 Swanst. 299; *S. C.* Rep. t. Finch, 338. In that case the father received the profits of the estate purchased in the name of his son for twenty years, made leases, took fines, inclosed part of the estate in a park, built much, and provided materials for more buildings, gave directions for a settlement, and treated for a sale of the estate, yet, after all this, it was decided by Lord *Nottingham*, after much consideration, that the purchase by the father in the son's name was an advancement. "In all cases whatsoever," said his Lordship, "where a trust shall be between father and son contrary to the consideration and operation of law, the same ought to appear upon very plain, and coherent, and binding evidence, and not by any argument or inference from the father's continuing in possession and receiving the profits, which sometimes the son may not in good manners contradict, especially where he is *advanced but in part;* and if such inference shall not be made from the father's perception of profits, it shall never be made from any words between them in common discourse; for, in those there may be great variety and sometimes apparent contradiction. Therefore, where the proof is not clear and manifest, the Court ought to follow the law, and it is very safe so to do:" Rep. t. Finch, 340; see, however, *Murless* v. *Franklin*, 1 Swanst. 171. Upon the same principle, in *Sidmouth* v. *Sidmouth*, 2 Beav. 447, where moneys were invested in the funds by a father in the name of the son, the dividends of which were received by the father during his life, under a power of attorney from his son, it was held, after his death, that this was an advancement, and that the funds belonged to the son.

Where, however, a son is *fully advanced*, the father's entering into possession and into the receipt of the rents or profits of property purchased in the son's name, *may* be considered as evidence of a trust. See *Grey* v. *Grey*, 2 Swanst. 600.

The presumption of advancement may be rebutted by evidence of facts showing the father's in-

tention that the son should take property, purchased in his name, as a trustee, and not for his own benefit. Such facts, however, must have taken place antecedently to, or contemporaneously with, the purchase, or else immediately after it, so as to form, in fact, part of the same transaction (*Grey* v. *Grey*, 2 Swanst. 594; *Redington* v. *Redington*, 3 Ridg. P. C. 106, 177, 194; *Murless* v. *Franklin*, 1 Swanst. 17, 19; *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65; *Prankerd* v. *Prankerd*, 1 S. & S. 1; *Christy* v. *Courtenay*, 13 Beav. 26; *Collinson* v. *Collinson*, 3 De G. Mac. & G. 409; *Bone* v. *Pollard*, 24 Beav. 283; *Childers* v. *Childers*, 1 De G. & Jo. 482). And it seems that where evidence contemporaneous with the transaction shows that the father had an intention of reserving a life interest in the property to himself, or that he had an intention of qualifying the absolute right purported to be given to his son, the presumption of advancement will be rebutted: *Dumper* v. *Dumper*, 3 Giff. 583; *Down* v. *Ellis*, 35 Beav. 578; *Stock* v. *M'Avoy*, 15 L. R. Eq. 55. But subsequent facts will not be admissible in evidence to show the intention of the father against the presumption of advancement. Thus a devise of the property, as in the principal case (*Mumma* v. *Mumma*, 2 Vern. 19; *Crabb* v. *Crabb*, 1 My. & K. 511; *Skeats* v. *Skeats*, 2 Y. & C. C. C. 9; *Jeans* v. *Cooke*, 24 Beav. 513; *Dumper* v. *Dumper*, 3 Giff. 583; *Williams* v. *Williams*, 32 Beav. 370), or a mortgage, (*Back* v. *Andrew*, 2 Vern. 110), or a demise of copyholds by a licence obtained *subsequently* to the purchase in the name of the child (*Murless* v. *Franklin*, 1 Swanst. 13), will be ineffectual: secus, where the licence to lease is obtained, or a surrender to the use of a will is made at the same Court as the grant: *Swift* v. *Davis*, 8 East, 354, n.; *Prankerd* v. *Prankerd*, 1 S. & S. 1. Or where there is a formal and unmistakable act of taking possession on the part of the father. Suppose for instance a man bought a shop in his son's name, and immediately took possession and put his own name over the door, that would be an ostensible taking possession sufficient to show ownership in the father, and trusteeship in the son: *per Wickens*, V.-C., in *Stock* v. *M'Avoy*, 15 L. R. Eq. 59. And where a father soon after a purchase in the name of his son, called on the tenant and gave him notice to quit, although he ultimately allowed him to remain, it was held by Sir *J. Wickens*, V.-C., that "although that circumstance could not perhaps be taken as an unmistakable act of taking possession by the father, sufficient to establish that he purchased for himself, nevertheless it was a circumstance of great weight, and looking at that

and the rest of the evidence, he was of opinion that it was a trust and not an advancement." Ib. 55, 59.

The presumption of advancement may also be rebutted by evidence of parol declarations of the father contemporaneous with, but not by any of his declarations made subsequent to, the purchase: *Elliot* v. *Elliot*, 2 Ch. Ca. 231; *Woodman* v. *Morrell*, 2 Freem. 33; *Birch* v. *Blagrave*, Amb. 266; *Finch* v. *Finch*, 15 Ves. 51; *Redington* v. *Redington*, 3 Ridg. P. C. 106; *Sidmouth* v. *Sidmouth*, 2 Beav. 456; *O'Brien* v. *Sheil*, 7 I. R. Eq. 255. But where a person had transferred stock into the joint names of himself, wife, and child, and had regularly received the dividends; Sir *J. Stuart*, V.-C., some years after the transfer, received the evidence of the husband and wife as to his intention at the time of the transfer, in order to repel the presumption of advancement: *Devoy* v. *Devoy*, 3 Sm. & Giff. 403; *Forrest* v. *Forrest*, 13 W. R. (V.-C. S.), 380; see also *Stone* v. *Stone*, 3 Jur. N. S. 708; and the remarks on these cases in *O'Brien* v. *Sheil*, 7 I. R. Eq. 255. See also *Williams* v. *Williams*, 32 Beav. 370.

In *Worthington* v. *Curtis*, 1 Ch. D. 419, a father effected a policy in the name and on the life of his son, in which he had no insurable interest, and paid the premiums and kept possession of the policy until his son's death, ten years afterwards. The son died, and the office paid the money assured to the father his administrator, whereupon creditors of the son filed a bill against the father for the administration of his son's estate. It was held by the Court of Appeal, affirming the decision of *Bacon*, V.-C., upon evidence given that the father effected the insurance for his own benefit; that although as between the insurer and the company the policy was illegal and void under 14 Geo. 3, c. 48, yet as between the father and the estate of the son the father was entitled to retain the money for his own benefit. "If," said *Mellish*, L. J., "the case stood on probability, I should have been of opinion that the father probably intended it for his son's benefit, and that is the presumption of law; but on the other hand, as it is sworn by the father that he effected the policy on his own account, and this is confirmed by the evidence of his wife, and as for a period of ten years he regularly paid the premiums and kept the policy in his own possession, we think there is no sufficient reason for differing from the conclusion arrived at by the Vice-Chancellor, that as between the father and the son the policy was the property of the father. . . . There are two reasons why the appeal must fail. First because the Statute (14 Geo. 3, c. 48) is a defence for the Insurance

Company only, if they choose to avail themselves of it. If they do not, the question who is entitled to the money must be determined as if the Statute did not exist. The contract is only made void as between the company and the insurer. And, secondly, if that is not so, and if the effect of the Statute is that the Court will give no relief to any party because of the illegality of the transaction, in that case the maxim, melior est conditio possidentis, must prevail, and the party who has the money must keep it."

A fortiori, parol evidence may be given by the son to show the intention of the father to advance him; for such evidence is in support both of the legal interest of the son and of the equitable presumption; *Lamplugh* v. *Lamplugh*, 1 P. Wms. 113; *Redington* v. *Redington*, 3 Ridg. P. C. 182, 195; *Taylor* v. *Taylor*, 1 Atk. 386.

The acts and declarations of the father *subsequent* to the purchase may be used in evidence *against* him by the son, although they could not, as we have before seen, be used by the father against the son: (*Redington* v. *Redington*, 3 Ridg. P. C. 195, 197; *Sidmouth* v. *Sidmouth*, 2 Beav. 455; *Stock* v. *M'Avoy*, 15 L. R. Eq. 55;) and the better opinion seems to be, that the subsequent acts and declarations of the son can be used against him by the father where there is nothing showing the intention of the father, at the time of the purchase, sufficient to counteract the effect of those declarations: *Sidmouth* v. *Sidmouth*, 2 Beav. 455; *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65; *Pole* v. *Pole*, 1 Ves. 76; *Jeans* v. *Cooke*, 24 Beav. 521; see, however, *Murless* v. *Franklin*, 1 Swanst. 20.

Evidence, however, it seems, will not be admissible to rebut the presumption of advancement where the object of the evidence is to show that the person who made the transfer intended it to take effect in fraud of the law. See *Childers* v. *Childers*, 3 K. & J. 310; there a father conveyed by registered deed 900 acres of land in the Bedford Level to his son in order to make him eligible as a bailiff. The son shortly afterwards died, without being aware of the conveyance, and without having been elected bailiff. It was held by Sir *W. Page Wood*, V.-C., that the gift was irrevocable, and that the heir of the son was entitled to it for his own benefit. "I cannot," said his Honor, "allow the plaintiff to say, 'I intended this deed to operate in fraud of the law.'" Upon the discovery of fresh evidence in this case—a letter to the Registrar of the Level—the order of the Vice-Chancellor was discharged, and leave was given to amend the bill. Whereupon it was held by the Lords Justices, upon the evidence, that neither the father nor the Registrar intended or

considered the transaction to have the effect of making the son beneficial owner; that, moreover, on the construction of the Bedford Level Act, a dry legal estate was a sufficient qualification. And that, therefore, as there was nothing illegal in the father's design, and no intention to represent the son as beneficial owner, the father was entitled on the ground of trust or mistake or both to have a reconveyance from the heir of the son. See *Childers* v. *Childers*, 1 De G. & Jo. 482. In *May* v. *May*, 33 Beav. 81, a conveyance of property by a father to his son to give him a qualification to vote was held not invalid but a bounty. In *Davies* v. *Otty*, 35 Beav. 208, the plaintiff, believing that his wife, who had deserted him ten years previously, was dead, married a second time, and having afterwards heard that his first wife was living, and thinking that he was liable to be convicted for bigamy, absolutely conveyed his real estate to the defendant in consideration of 20*l*. It was proved by parol evidence that the deed was executed in pursuance of an arrangement that the defendant should hold the property at the disposal of the plaintiff. The plaintiff's alarm was groundless; the consideration was never paid. The plaintiff remained in possession, and paid certain sums due to a building society in respect of the property. The defendant denied the trust, and claimed the benefit of the Statute of Frauds (29 Car. 2, c. 3). It was held by Sir *John Romilly*, M. R., that "the operation of the Statute of Frauds was excluded by the fraud of the defendant in refusing to reconvey. And also by reason of a resulting trust within the 8th section of the Statute, his Honor said he was clearly of opinion that there was no illegality in the transaction, and that the plaintiff was quite justified, morally and legally, in marrying the second wife, although the effect of it may have been that she did not become his wife. The long absence of his first wife was sufficient to justify the plaintiff in coming to the conclusion that she was dead." See also *Manning* v. *Gill*, 13 L. R. Eq. 485; *Haigh* v. *Kaye*, 7 L. R. Ch. App. 469.

As to the presumption of advancement of a wife being rebutted on a purchase by a husband of stock in the joint names of himself and his wife, see *Smith* v. *Warde*, 15 Sim. 56, and *Hoyes* v. *Kimbersley*, 2 Sm. & Giff. 195.

So where it appears that a husband has paid money into a bank to an account opened in his wife's name as a mere agency account, for the purpose of convenience, and without any contract or intention to give the wife any interest in such money, it will be the property of the husband and not of the wife. See *Lloyd* v. *Pughe*, 8 L. R. Ch. App.

88, reversing *S. C.*, 14 L. R. Eq. 241.

Any surrounding circumstances may be taken into consideration so as to rebut the presumption of advancement upon transfer of a banking account by a husband into the joint names of himself and his wife. See *Marshal* v. *Crutwell*, 20 L. R. Eq. 328. There the husband of the plaintiff, being in failing health, transferred his banking account from his own name into the joint names of himself and his wife, and directed the bankers to honour cheques drawn either by himself or his wife, and he afterwards paid in considerable sums to this account. All cheques were afterwards drawn by the plaintiff at the direction of her husband, and the proceeds were applied in payment of household and other expenses. The husband never made any statement to the plaintiff as to his intention in opening the joint account, but the bank manager deposed to his having remarked at the time of the transfer, that the balance of the account would *belong* to the survivor of himself and his wife. After the death of her husband (which took place a few months after the transfer) the plaintiff claimed to be entitled to the balance. It was held by Sir *G. Jessell*, M. R., who attributed no weight to the evidence of the bank manager, that taking into consideration the surrounding circumstances, the transfer of the account was not intended to be a provision for the plaintiff, but merely a mode of conveniently managing her husband's affairs, and consequently that she was not entitled to such balance. "In transferring a sum of stock," said his Honor, "there is no obvious motive why a man should put a sum of stock into the name of himself and his wife, . . . except the motive of benefiting her in case she survives. But here we have the actual fact, that the man was in such a state of health that he could not draw cheques, and the wife drew them. . . . I take into account the circumstance that the wife could draw upon the fund in the husband's lifetime, so that it would not necessarily be a provision for her after his death, and also the circumstance that the amount of the fund at his death must be altogether uncertain." See also *Lloyd* v. *Pughe*, 8 L. R. Ch. App. 88, reversing *S. C.*, 14 L. R. Eq. 241.

Where part of the money invested in stock by a husband in the name of himself and his wife is sold out by them, it becomes his property. Thus, in *Re Gadbury*, 11 W. R. (V.-C. K.) 895, a sum of money was invested in the funds in the joint names of a husband and wife, and she, by power of attorney from him, sold out a portion, and with his knowledge kept it locked up in her own special

custody until his death. It was held by Sir *R. T. Kindersley*, V.-C., that the portion which remained in the funds in the joint names of the husband and wife survived to the wife, but that the other portion, which was sold out by her and kept in her custody, formed, on the husband's death, a part of his general personal estate.

Purchase in the name of a third party, when void or voidable.]—Where an advancement is made by a person largely indebted at the time, it will be void under the 13 Eliz. c. 5, as against his creditors: (*Christy* v. *Courtenay*, 13 Beav. 96, 101; *Barrack* v. *M'Culloch*, 3 K. & J. 110; sed vide *Drew* v. *Martin*, 2 Hem. & Mill. 133), but it is not within 27 Eliz. c. 4: *Drew* v. *Martin*, 2 Hem. & Mill. 130, 133.

And where the relation of client and solicitor subsists between the parent and child, the ordinary presumption in favour of the transaction being a gift, will be excluded, and the burden of proof, as to its validity, will be thrown upon the son acting as solicitor: *Garrett* v. *Wilkinson*, 2 De G. & Sm. 244; and see *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 352.

Where a father transfers shares in an incorporated company to his infant son, although the son might claim the shares as an advancement, nevertheless the Court will, on the part of the infant, repudiate the shares, if the company be wound up, and the father will be a contributory (*Reid's Case*, 24 Beav. 318; *Richardson's Case*, 19 L. R. Eq. 588; *Weston's Case*, 5 L. R. Ch. 614); but where the father has applied for shares in the name of his son, and although he has paid a deposit, if the company have refused to allow him to execute the deed on behalf of his son, he will not be a contributory: *Maxwell's Case*, 24 Beav. 321.

TOLLET *v.* TOLLET.

De Term S. Michaelis, 1728.

[REPORTED 2 P. WMS. 489.]

S.C., Mos. 46; 2 Eq. Ca. Ab. 233, pl. 16; 663, pl. 10.

DEFECTIVE EXECUTION OF A POWER AIDED.]—*Husband has a power to make a jointure to his wife by deed: he does it by will, and she has no other provision; equity will make this good. Equity will supply the want of a surrender of a copyhold, in case it be devised for payment of debts, or for a wife, or for younger children; so also will it help a defective execution of a power; but not a non-execution.*

THE husband, by virtue of a settlement made upon him by an ancestor, was tenant for life, with remainder to his first and other sons in tail male, with a power to the husband to make a jointure on his wife by *deed* under his hand and seal.

The husband having a wife, for whom he had made no provision, and being in the *Isle of Man*, by his last *will*, under his hand and seal, devised part of his lands within his power to his wife for her life.

Objection.—This conveyance, being by a will, is not warranted by the power, which directs that it should be by *deed;* and a will is a voluntary conveyance, and, therefore, not to be aided in a Court of Equity.

(*a*) Equitable relief will be granted although the wife or child seeking it is provided for. Vide *Kettle* v. *Townsend*, 1 Salk. 187; *Smith* v. *Baker*, 1 Atk. 385; *Hervey* v. *Hervey*, 1 Atk. 568; *Chapman* v. *Gibson*, 3 Bro. C. C. 229.

SIR JOSEPH JEKYLL, M. R.—This is a provision for a wife who had none before, and within the same reason as a provision for a child not before provided for (*a*); and as a Court of Equity would, had this been the case of a copyhold *devised*, have supplied the want of a surrender; so where there is a defective execution of the power, be

it either for payment of debts or provision for a wife or children unprovided for, I shall equally supply any defect of this nature.

The difference is betwixt a *non-execution* and a *defective execution of a power;* the latter will always be aided in equity, under the circumstances mentioned, it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child. But this Court will not help the *non-execution* of a power, since it is against the nature of a power, which is left to the free will and election of the party whether to execute or not; for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself.

And in this case, the legal estate being in trustees, they were decreed to convey an estate to the widow for life in the lands devised to her by her husband's will.

Wherever the formalities required by a power are not strictly complied with, the appointment will, at law (unless made valid by statute, see post, pp. 271, 272), be void, and the property which is the subject of the power will consequently go as in default of appointment. Courts of Equity, however, although not holding the power to be well executed, will, in favour of certain parties, aid the defective execution of a power by compelling, as in the principal case, the person having the legal interest to transfer it in the manner pointed out by the defective appointment. The principle upon which Courts of Equity act in these cases is thus stated by Lord *Alvanley*, M. R., in the case of *Chapman* v. *Gibson*, 3 Bro. C. C. 229: "I have looked," said his Lordship, "at all the cases I can, to find on what principle this Court goes in supplying a defect, and altering the legal right; it is this: Whenever a man, having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the Court will operate upon the conscience of the heir, to make him perfect this intention." In the same case his Lordship remarked, "that the execution of a power, and a surrender of a copyhold, go hand in hand, precisely on the same ground." It may, therefore, be considered as a settled rule, that the Court interposes its aid upon the same principles and under

similar circumstances in cases of a want of a surrender of copyholds, and a defective execution of a power. See also *Rodgers* v. *Marshall*, 17 Ves. 297.

Surrenders of copyholds to the use of wills were rendered unnecessary for the future by 55 Geo. 3, c. 192, repealed by 1 Vict. c. 26, which, however, substitutes similar provisions. See sects. 3, 4, and 5.

Although there are decisions leading to an opposite conclusion (*Rodgers* v. *Marshall*, 17 Ves. 295; *Ellis* v. *Nimmo*, L. G., temp. Sugd. 333), it is now clearly settled, in accordance with the inference which may be drawn from the remark of the Master of the Rolls in the principal case, that equity will not supply a surrender in the case of a *deed* at the instance of persons having merely a *meritorious* consideration, any more than it will carry into execution a voluntary contract at the instance of the same persons (*Jefferys* v. *Jefferys*, Cr. & Ph. 138; *Tatham* v. *Vernon*, 29 Beav. 604); secus where the consideration is valuable: *Nandike* v. *Wilkes*, Gilb. Eq. Rep. 114; *Jennings* v. *Moore*, 2 Vern. 609; *Cotter* v. *Layer*, 2 P. Wms. 623. See *Price* v. *Price*, 14 Beav. 604.

Although, however, the jurisdiction of equity to supply surrenders of copyholds is now seldom exercised (see *Freeman* v. *Freeman*, Kay, 479), nevertheless, since equity aids defective executions of powers upon precisely the same principles, and for and against the same persons, it will still be useful to consider the cases upon supplying the surrenders of copyholds. See *Sayer* v. *Sayer*, *Innes* v. *Sayer*, 7 Hare, 387.

It is clearly settled that a defective appointment by a married woman will be aided (*Pollard* v. *Grenvil*, 1 Ch. Ca. 10; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; *Doe* v. *Weller*, 7 T. R. 480; *Stead* v. *Nelson*, 2 Beav. 245; *The London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. C. 572); although, by some extra-judicial observations of Sir *Thomas Plumer*, in *Martin* v. *Mitchell*, 2 J. & W. 424, this appears to have been doubted. See also *Dillon* v. *Grace*, 2 S. & L. 456.

As to the classes in whose favour equity will aid a defective execution of a power or supply a surrender.] —First, equity will aid purchasers (*Fothergill* v. *Fothergill*, 2 Freem. 257; *Jackson* v. *Jackson*, 4 Bro. C. C. 462; *Sergeson* v. *Sealey*, 2 Atk. 414; 9 Mod. 390; *Wade* v. *Paget*, 1 Bro. C. C. 363; *Burrell* v. *Crutchley*, 15 Ves. 544; *Affleck* v. *Affleck*, 3 Sm. & Giff. 394; *In re Dykes' Estate*, 7 L. R. Eq. 337); and mortgagees (*Taylor* v. *Wheeler*, 2 Vern. 564; *Jennings* v. *Moore*, 2 Vern. 609; *The London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. C. 572); and lessees (*Campbell* v. *Leach*, Amb.

740; *Shannon* v. *Bradstreet*, 1 S. & L. 52; *Doe* v. *Weller*, 7 T. R. 478; Willes, 176; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; *King* v. *Roney*, 5 Ir. Ch. Rep. 64, 72); mortgagees and lessees being purchasers pro tanto. And it has been laid down, "That in order to constitute a purchaser in whose favour a defective execution of a power can be aided, there must be a consideration and an intention to purchase, either proved or to be presumed," per Sir *George Turner*, V.-C., 9 Hare, 769.

Secondly, equity will aid creditors. Thus, where a person directed his copyhold estate to be sold for payment of debts, and died without having surrendered it to the use of his will, equity decreed the surrender to be supplied, and the copyhold estate to be sold. See *Bixby* v. *Ley*, 2 Bro. C. C. 325; *S. C.*, 2 Dick. 698; *Ithell* v. *Beane*, 1 Ves. 215; *Tudor* v. *Anson*, 2 Ves. 582; *Fothergill* v. *Fothergill*, 2 Freem. 257. In *Wilkes* v. *Holmes*, 9 Mod. 485, power was given, in a marriage settlement, to the husband and wife to raise 2000*l.* out of certain lands of the wife's; and if no part should be raised in the life of the husband and wife, then it should be lawful for the survivor of them by will *duly* executed, to raise that sum, for the purpose of paying the debts of the husband and wife, or either of them, or making a provision for younger children. The wife, upon the death of the husband, defectively executed the power; it was objected, that the debts which were to be paid by means of the power were the debts of the husband, whereas the estate was originally the wife's. However, Lord *Hardwicke* supplied the defect, observing that the debts were expressly provided for by the deed of settlement.

Where, moreover, a person has a general power of appointment over property which in default of appointment is given over, if he exercises such appointment in favour of volunteers by deed, or by will, equity will interfere and intercept such property in aid of the assets of the appointor for the benefit of his creditors, but if he does not exercise his power equity cannot interfere, and the persons entitled in default of appointment will be entitled to the property. See *Thompson* v. *Towne*, 2 Vern. 319; *Holmes* v. *Coghill*, 7 Ves. 499, 12 Ves. 206; *Fleming* v. *Buchanan*, 3 De G. Mac. & G. 976; and the note to *Silk* v. *Prime*, 2 Lead. Cas. Eq., and the cases there cited.

Thirdly, charities will be aided. "I take," says Lord *Northington*, "the uniform rule of this Court, both before, at, and after the Statute of Charitable Uses (43 Elizabeth, c. 4) to have been, that where the uses are charitable, and the person has in himself full power to convey, the Court will aid a defective conveyance to such

uses : " *Attorney-General* v. *Tancred*, 1 Eden, 14 : see also *Piggot* v. *Penrice*, Prec. Ch. 471 ; Com. Rep. 250 ; *Attorney-General* v. *Sibthorpe*, 2 Russ. & My. 111 n. In *Innes* v. *Sayer* (7 Hare, 377), a testatrix had power to dispose of certain sums of stock by her last will and testament, or any writing purporting to be her last will and testament, to be by her signed and published in the presence of, and attested by, two or more credible witnesses. The testatrix by her will, dated in January, 1833, unattested, and not referring to the power, gave certain sums of stocks to charities. She afterwards made eight other unattested testamentary papers, giving legacies, or revoking legacies, previously inserted, the last of which papers was dated the 1st of September, 1836; and at the foot of it she had written as follows :—" This will has not been witnessed, as I intend, if I am spared, to write it out fair." The testatrix died in June, 1844. It was held by Sir *James Wigram*, V.-C., that the defect in the execution of the power ought to be supplied in equity in favour of the charities. " The principle," said his Honor, " upon which the Court appears to go is this, that if a person has power, by his own act, to give property, and has, by some paper or instrument, clearly shown that he intended to give it, although that paper, by reason of some informality, is ineffectual for the purpose, yet the party having the power of doing it by an effectual instrument, and having shown his intention to do it, the Court will, in the case of a charity, by its decree make the instrument effectual to do that which was intended to be done. It is not for me to give any opinion whether the principle is right or not. There appears to be very high authority for the application of the principle, independently of the Statute of Charitable Uses (43 Elizabeth, c. 4), and it has been applied since the Statute." See *S. C.*, affirmed on appeal, 3 Mac. & G. 606, Tudor on Charitable Trusts, p. 37, 255, 2nd edit.

Fourthly, equity will aid a wife and a legitimate child, although they claim merely as volunteers, upon a meritorious consideration; as, for instance, upon a provision made for them after marriage : *Fothergill* v. *Fothergill*, 2 Freem. 257 ; *Sarth* v. *Blanfrey*, Gilb. Eq. Rep. 166 ; *Sneed* v. *Sneed*, Amb. 64 ; *Churchman* v. *Hervey*, Amb. 335 ; *Medwin* v. *Sandham*, 3 Swanst. 686 ; *Affleck* v. *Affleck*, 3 Sm. & Giff. 394 ; *Proby* v. *Landor*, 28 Beav. 504. " In cases," says Lord *Hardwicke*, " of aiding the defective execution of a power, either for a wife or a child, whether the provision has been for a valuable consideration has never entered into the view of the Court, but being intended for a provision, whether voluntary or not, has been always held to en-

title this Court to give aid to a wife or child to carry it into execution, though defectively made :" *Hervey* v. *Hervey*, 1 Atk. 567 ; *Barron* v. *Constabile*, 7 Ir. Ch. Rep. 467.

Although an inference to the contrary might be drawn from the principal case, it is now clearly established that a wife or child, although provided for, will be entitled to the aid of equity. "I am of opinion," says Lord *Hardwicke*, in *Hervey* v. *Hervey*, "that the rule as laid down by the defendant's counsel, that a wife or child, who comes for the aid of this Court to supply a defective execution of a power, must be entirely unprovided for, is not the right rule of the Court. I think the general rule, that the husband or a father are the proper judges what is a reasonable provision for a wife or child, is a good and invariable rule :" 1 Atk. 568 ; see also *Kettle* v. *Townsend*, 1 Salk. 187 ; *Smith* v. *Baker*, 1 Atk. 385 ; *Chapman* v. *Gibson*, 3 Bro. C. C. 229.

To no other persons, except a wife or legitimate child, will the aid of the Court be granted, upon the ground of the provision being for a meritorious consideration ; neither to a husband (*Watt* v. *Watt*, 3 Ves. 244 ; *Moodie* v. *Reid*, 1 Madd. 516 ; *Hughes* v. *Wells*, 9 Hare, 749, 769) ; nor to a natural child (*Fursaker* v. *Robinson*, Prec. Ch. 475) ; *Tudor* v. *Anson*, 2 Ves. 582) ; nor to a grandchild (*Bland* v. *Bland*, 2 Cox, 349 ; *Perry* v. *Whitehead*, 6 Ves. 544 ; and 1 Watk. Copyh. 136, 138) ; nor to a father (*Sloane* v. *Lord Cadogan*, App. to Sug. on Powers, No. 9, 7th edit.) ; nor to a mother, brother, or sister (*Goodwyn* v. *Goodwyn*, 1 Ves. 228 ; *Goring* v. *Nash*, 3 Atk. 189, overruling *Watts* v. *Bullas*, 1 P. Wms. 60) ; nor to a nephew or niece (*Strode* v. *Russel*, 2 Vern. 621, 625 ; *Marston* v. *Gowan*, 3 Bro. C. C. 170) ; nor to a cousin (*Tudor* v. *Anson*, 2 Ves. 582) ; nor to a settlor defectively executing a power in his own favour (*Ward* v. *Booth*, cited 3 Ch. Ca. 69, 92 ; *Ellison* v. *Ellison*, post, 273, 6 Ves. 656). A fortiori equity will not afford its aid to a mere volunteer, in no way related to the person defectively executing a power : *Smith* v. *Ashton*, 2 Freem. 309 ; *Sergeson* v. *Sealey*, 2 Atk. 415 ; *Godwin* v. *Kilsha*, Amb. 684.

Next, as against whom equity will aid a defective execution of a power, or supply a surrender.]—It is clear, from the principal case, that aid will be granted as against the remainderman who takes, although by purchase, subject to the power (*Coventry* v. *Coventry*, 2 P. Wms. 222 ; *Shannon* v. *Bradstreet*, 1 S. & L. 52) ; and also in general as against an heir-at-law or customary heir : *Smith* v. *Ashton*, 1 Ch. Ca. 263, 264.

A defective execution of a power has been aided in equity in favour of a sister as against her

brothers who were provided for, and who in default of appointment would have participated in the property: *Morse* v. *Martin*, 34 Beav. 500.

It has, however, been a question of much difficulty, whether equity will afford its aid as against an heir totally unprovided for. In *Chapman* v. *Gibson*, 3 Bro. C. C. 229, Lord *Alvanley* thought that the heir, being a *son* of the testator unprovided for, could not be relieved against. "The principle," said his Lordship, "must be this, that the testator being under an obligation to do an act, we will compel the heir to perfect it; but we will not compel him to fulfil an obligation at the expense of another; and, if the testator has totally forgot to make any provision for his eldest son, this shall be an answer to the claim of the wife, or other children." Lord *Rosslyn* thought that the Court ought never to enter into the consideration of the heir being or not being provided for. "I confess," observes his Lordship, "it appears to me, there is no rule at all, unless the Court takes it upon the relation in which they stand. Otherwise, it is all loose and arbitrary. It never entered into the mind of the Court to consider that argument, where the want of a surrender was to be supplied for creditors: but the same sort of argument might be used there—that the heir was starving, the creditors opulent and severe. Those circumstances are not fit to be considered by the Court. The Court must go upon a certain line, which is very obvious—that, where the will expresses an intention to do that which legally and morally the testator ought to do, so simple a form as supplying the want of a surrender shall not impede the performance of that duty:" *Hills* v. *Downton*, 5 Ves. 564. But, it was unnecessary to decide that point in *Hills* v. *Downton*, for the heiresses-at-law, against whom the want of a surrender was supplied, were married, and therefore, in Lord *Rosslyn's* opinion, provided for. Lord *Alvanley*, nevertheless, still retained the opinion he expressed in *Chapman* v. *Gibson*. See his observations on *Hills* v. *Downton*, Sugd. Pow. vol. ii., App. No. xxiv., 7th ed. In *Braddick* v. *Mattock*, 6 Madd. 363, Sir *J. Leach*, V.-C., said, "This Court will not supply a surrender against the heir-at-law unprovided for; but it considers the parent as the best judge of the provision of that heir, and will not examine the sufficiency of the provision, unless perhaps in a case in which it may be challenged as illusory." In *Rodgers* v. *Marshall*, 17 Ves. 294, Sir *W. Grant*, M. R., seemed inclined to think, that, as against a grandchild, being the heir-at-law, and unprovided for, the want of surrender ought not to be supplied, and directed an inquiry as to whether he was

provided for. But see *Hills* v. *Downton*, 5 Ves. 565.

It is clear, however, that a surrender will be supplied as against a collateral heir, whether provided for or not; as a person is not supposed to be under any obligation to provide for a collateral heir: *Fielding* v. *Winwood*, 16 Ves. 90; see also *Chapman* v. *Gibson*, 3 Bro. C. C. 229; *Smith* v. *Baker*, 1 Atk. 385.

As to the nature of a defect which will be aided.]—It may be laid down as a general rule, that where the intention to execute a power is sufficiently declared, but the act declaring the intention is not an execution of the power in the form prescribed, there the defect will be supplied in equity: *Shannon* v. *Bradstreet*, 1 S. & L. 63.

Thus equity will aid a defect which arises from the instrument itself being informal or inappropriate, if the intention to execute the power appear clearly in writing, where, for instance, a donee of a power covenants to execute it (*Fothergill* v. *Fothergill*, 2 Freem. 256; *Coventry* v. *Corentry*, Franc. Max., the last case; *S. C.*, 2 P. Wms. 222; *Sergeson* v. *Sealey*, 2 Atk. 414; *Sarth* v. *Lord Blanfrey*, Gilb. Eq. Rep. 166);—or when, by his will, he desires the remaindermen to create the estate authorised by the power (*Vernon* v. *Vernon*, Amb. 1):—or if he enters into an agreement to execute it (*Shannon* v. *Bradstreet*, 1 S. & L. 52; *Mortlock* v. *Buller*, 10 Ves. 292; *Coventry* v. *Coventry*, Franc. Max., the last case; *Lowry* v. *Dufferin*, 1 Ir. Eq. Rep. 281; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345);—even although he keep the agreement in his own possession (*King* v. *Roney*, 5 Ir. Ch. Rep. 64, 77);—or if by a mere writing, not sealed and delivered, he expresses an intention to give property which he had power to appoint by instrument sealed and delivered (*Kennard* v. *Kennard*, 8 L. R. Ch. App. 230—or if he promises by letters to grant an estate (*Campbell* v. *Leach*, Amb. 740; Sugd. on Powers, App. No. xxv., 7th ed.; and see *Blake* v. *French*, 5 Ir. Ch. Rep. 246)—or to give a security (*The London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. C. 572); which he could only do by the exercise of his power. So an agreement to sell land to a Railway Company at a sum to be fixed by arbitrators, will be aided in equity as an informal execution of a general power of appointment: *In re Dykes' Estate*, 7 L. R. Eq. 337. A recital by the donee of a power, in the marriage settlement of one of his daughters, who was one of the objects of the power, that she was entitled to a share of a sum to which she could only be entitled by his appointment, has been held sufficient evidence of his intention to exe-

cute the power, and was therefore aided as a defective execution of a power: *Wilson* v. *Piggott*, 2 Ves. jun. 351; *Poulson* v. *Wellington*, 2 P. Wms. 533. So also where a donee of a power, in an answer to a bill in Chancery, states that he "appoints, and intends, by writing in due form, to appoint:" *Carter* v. *Carter*, Mos. 365; and see *Fortescue* v. *Gregor*, 5 Ves. 553.

A parol contract, however, to execute a power, is void, *as against a remainderman*, although, in the case of a parol contract to grant a lease under a power, the lessee may have expended money in improvements, on the faith of the parol contract (*Carter* v. *Carter*, Mos. 370; *Shannon* v. *Bradstreet*, 1 S. & L. 72; *Blore* v. *Sutton*, 3 Mer. 237; *Lowry* v. *Lord Dufferin*, 1 Ir. Eq. Rep. 281; and see *Morgan* v. *Milman*, 10 Hare, 279; 3 De G. Mac. & G. 24, 32, 33; *O'Fay* v. *Burke*, 8 Ir. Ch. Rep. 225); unless, after the death of the tenant for life, the remainderman lie by and suffer the lessee to continue to improve the estate: *Stiles* v. *Cowper*, 3 Atk. 692.

Equity will afford its aid, where there has been a defective execution by a formal or appropriate instrument: thus, if the instrument, whether it be a deed or will, is by the power required to be executed in the presence of a certain number of witnesses, and it is executed in the presence of a smaller number; or if it is required to be signed and sealed, and sealing is omitted, equity will supply the defect: *Wade* v. *Paget*, 1 Bro. C. C. 363; *Cockerell* v. *Cholmeley*, 1 Russ. & My. 424; 1 C. & F. 60. And in wills not coming within the operation of the late Wills Act (1 Vict. c. 26), an appointment of personalty required to be attested by two witnesses, has been aided, though attested by no witness: *Lucena* v. *Lucena*, 5 Beav. 146. So, also, where a power of appointment over land was required to be exercised by will *duly executed*, and a will was made in exercise of the power, attested by *two* witnesses only, Lord *Hardwicke* was of opinion that the will was not duly executed within the meaning of the power, but that the Court ought to aid the defective execution in favour of the creditors and younger children, considering their claim as under the settlement, and the mode of executing the power as depending on the settlement, and not on the Statute of Frauds (29 Car. 2, c. 3), except as the words "duly executed" were construed by reference to that statute. If this had been a voluntary execution of the power, and not for payment of debts, or for valuable or meritorious consideration, it must have stood on its own ground, and would not have been supported: *Wilkie* v. *Holmes*, 1 S. & L. 60, n.; *S. C.*, reported under the name of *Wilkie* v. *Holme*, 1 Dick. 165; *S. C.*, 9 Mod. 485; and see *Smith* v. *Ashton*, 1 Ch.

Ca. 263; *Morse* v. *Martin*, 34 Beav. 500. See, however, now, the late Wills Act (1 Vict. c. 26), whereby it is enacted, "that no will shall be valid unless it shall be in writing and executed in manner thereinafter mentioned; that is to say, it shall be signed at the foot or end thereof, by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will, in the presence of the testator, but no form of attestation shall be necessary" (sect. 9); and "that no appointment made by will in exercise of any power shall be valid, unless the same be executed in manner thereinbefore required; and every will executed in manner thereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity" (sect. 10).

A power will, as in the principal case, be aided, if it has been executed by a *will*, when it ought strictly to have been executed by deed: *Sneed* v. *Sneed*, Amb. 64; *Mills* v. *Mills*, 8 Ir. Eq. Rep. 192.

In *Hervey* v. *Hervey*, 1 Atk. 561, Barnard. 103, a power was given to the husband to make a jointure of *such* of the lands in a deed as he thought proper, not exceeding 600*l.* a year. The husband by successive deeds charged all the lands with rent-charges exceeding 600*l.* a year. Lord *Hardwicke* supplied in favour of the wife the defect occasioned by the excessive execution of the power. Upon the same principle in *Barron* v. *Constabile*, 7 Ir. Ch. Rep. 467, where the power was to *charge* a jointure not exceeding 600*l.* a year by deed or will, and the donee of the power *devised* instead of charging a jointure, the devise was upheld as a valid execution of the power.

So in *Bruce* v. *Bruce*, 11 L. R. Eq. 371, by articles on the marriage of Ann Bruce (then Ann Daniel) followed by a disentailing assurance, an estate was conveyed in trust for the children of the marriage as Ann Bruce should by *deed* appoint, and in default of appointment for such children equally. By a subsequent assurance, which was inoperative, Ann Bruce purported to put an end to the former power and to confer upon herself a general power of appointment over the same estate. She married a second time, and died leaving three children by the first marriage and two by the second, and having made *her will*, whereby without any reference to the power in the marriage articles,

pursuant to the alleged general power and *in exercise of every other power enabling her*, she purported to appoint the said estate to her eldest son by the first marriage, charged with a sum of 3000*l.* in favour of all the children by both marriages other than the eldest son. It was held by Lord *Romilly*, M. R., that the will operated as a valid exercise of the power in the articles, and that the eldest son was entitled to the estate, subject to raising the sum of 3000*l.* for the other two children of the first marriage.

But equity will not aid a defective execution of a power, if the intention of the author of the power would be thereby defeated. Thus, although there is no doubt that a Court of equity will aid the defective execution of a power in favour of a creditor or purchaser, although the donee be a married woman (*ante*, p. 256), the Court, in such cases, must be satisfied that the formalities which have not been observed, are no more than matters of form; and that the donee of the power has not by their non-observance been deprived of any of the protection which the due exercise of the power would have afforded her. For instance, in *Reed* v. *Shergold*, 10 Ves. 370, where a lady, entitled under a devise to copyholds for life, with a power to appoint them *by will*, sold and surrendered them to a purchaser, Lord *Eldon* held, that the purchaser could not be aided in equity. "The testator," said his Lordship, "did not mean that she should so execute her power — he intended that she should give by will, or not at all; and it is impossible to hold that the execution of an instrument or deed, which, if it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of her death, can be considered in equity an attempt in or towards the execution of the power."

And the Court looks with especial jealousy on any such transaction, in which the wife may have acted under the influence of her husband. Thus in *Hopkins* v. *Myall* (2 Russ. & My. 86), on a marriage, a settlement had been made of the wife's property to herself for life to her separate use, with remainder as she should appoint by any writing under her hand, attested by two witnesses, and for default of appointment to the children of the marriage. The trustees upon the joint application of the husband and wife, by a letter not attested by any witnesses, parted with the trust fund; it was held by Sir *John Leach*, M. R., that the trustees were bound, after the death of the wife, to make good the trust fund for the children. "The ceremonies," said his Honor, "required by the settlement were introduced for the express purpose of protecting the wife against the influence of

her husband, and are matters of substance and not of form; and without an adherence to those ceremonies, the interests of the children could not be defeated." See, also, *Thackwell* v. *Gardiner*, 5 De G. & Sm. 58; and *Majoribanks* v. *Hovenden*, 6 Ir. Eq. Rep. 238.

So an appointment not made within the time prescribed by the donor of the power will not be aided in Equity, where the time within which the appointment was to be made, was not a mere matter of form, but of the substance and essence of the power. See *Cooper* v. *Martin*, 3 L. R. Ch. App. 47.

Moreover the Court will not aid a defective instrument, where there does not appear thereby to have been on the part of the donee of the power a distinct intention to execute it. See *Garth* v. *Townsend*, 7 L. R. Eq. 220; there Mrs. Garth having power to appoint funds amongst her children by deed, or by her last will in writing, or any writing purporting to be or being in the nature of her last will, or any codicil thereto, to be signed and published in the presence of, and to be attested by, two credible witnesses, died intestate; but left in an envelope, addressed to her son, an unattested memorandum (signed by herself, and dated eight years before her death), "for my sons and daughters. Not having made a will, I leave this memorandum, and hope my children will be guided by it, though it is not a legal document. The funds I wish divided as follows" (and after apportioning the funds among her children, and making a bequest to them out of another fund, and a gift of the residue, she thus ends the memorandum):—"this paper contains my last wishes and blessings upon my dear children, and thanks for their love to me." It was held by Sir *W. M. James*, V.-C., that the Court could not aid any defects in the execution of the memorandum, so as to give it validity as an appointment. "The true test," said his Honor, "is that mentioned by Mr. Osborne Morgan: is there a distinct intention to execute the power? Now, here the persons to take and the amount to be taken, are sufficiently pointed out, but where the instrument fails is in *intention to execute the power*. Mrs. Garth purposely abstained from executing it. She simply wished her children to be quite unfettered, saying, 'I tell you my wishes, but I do not mean to tie you up by any legal document. I know I have power to appoint these funds, but I do not exercise that power.' The jurisdiction of the Court is to *supply defects occasioned by mistake or inadvertence: not to supply omissions intentionally made.*"

Formerly when trustees under a common power of sale and exchange sold an estate without the timber, such exercise of the power

was held not only to be invalid at law but also in equity, where the defect in the execution could not be aided. Thus, in *Cockerell* v. *Cholmeley*, 1 Russ. & My. 418, where an estate was devised to a trustee and his heirs, to the use of A. for life, without impeachment of waste, and a power of sale, with the consent of the tenant for life, was given to the trustee, the trustee, with the consent of the tenant for life, sold the estate under the power, without the timber, which was to be taken at a valuation: at law the power was held to be badly executed; and, upon a bill being filed in equity for relief by the purchasers of the estate, Sir *J. Leach*, M. R., held, that they were entitled to none. "The plaintiffs," said his Honor, "call upon this Court to supply the defect in the execution of the power. A Court of equity will, in favour of persons standing in the situation of the plaintiffs, supply a defect in the execution of a power which consists in the want of some circumstance required in the manner of execution, as the want of a seal, or of a sufficient number of witnesses, or where it has been exercised by a will instead of a deed. But here it is at law decided, that there was no power in the trustees to sell the land without the growing timber: and there is no execution by the trustees of the power to sell the land with the growing timber; and I find no authority which applies to the case." This case was, on appeal to the House of Lords, affirmed: 2 Russ. & My. 751; 6 Bligh, N. S. 120; 1 C. & F. 60; *Cholmeley* v. *Paxton*, 3 Bing. 207; *S. C.* nom. *Cockerell* v. *Cholmeley*, 10 B. & C. 564; *Cholmeley* v. *Paxton*, 5 Bing. 48, and see Sugd. Prop. 491. See, also, *Adney* v. *Field*, Amb. 654; *Stratford* v. *Lord Aldborough*, 1 Ridg. 281; *Scott* v. *Davis*, 4 My. & Cr. 87.

Upon the same principle, the sale of the surface of land under the ordinary power of sale, reserving the minerals, has been held to be invalid: *Buckley* v. *Howell*, 29 Beav. 546, and see Article 7, Jur. N. S., part 2, 235.

However, by the Property and Trustees Relief Amendment Act (22 & 23 Vict. c. 35), where under a power of sale a bonâ fide sale shall have been made of *an estate with the timber thereon, or any other articles attached thereto*, and the tenant for life, or any other party to the transaction, shall by mistake be allowed to receive for his own benefit a portion of the purchase-money as the value of the timber or other articles, the Court of Chancery, upon payment of the full value of the timber or other articles, at the time of the sale, with interest, and the settlement thereof, may declare the sale valid, and thereupon the legal estate is to vest as if the power had been duly executed (sect. 13).

Under the Settled Estates Act (19 & 20 Vict. c. 120), the Court may authorise a sale of timber or mines apart from the surface (*In re Mallin's Settled Estate*, 9 W. R. (V.-C. S.) 588; *Re Law*, 7 Jur. N. S. 511, see sect. 11); and on a sale of mines apart from the surface, with rights of using the surface for the workings, may reserve a rent in respect of the surface damage from time to time, *In re Milward's Estate*, 6 L. R. Eq. 248; moreover, on the sale of any land under the Act, "any earth, coal, stone, or mineral, may be excepted" (sect. 13).

By the Confirmation of Sales Act (25 & 26 Vict. c. 108), no sale, exchange, partition, or enfranchisement made in exercise of a trust or power not forbidding the exception or reservation of minerals, is to be invalid (unless already declared to be so, or there is a suit pending), on the ground only that the trust or power did not expressly authorise an exception or reservation of minerals which has been made (sect. 1), and hereafter such exception or reservation may be made by trustees and others, with the sanction of the Court of Chancery, to be obtained on petition (sect. 2). The Act does not, however, extend to Ireland or Scotland (sect. 3).

Mortgagees are within the Confirmation of Sales Act, and may, even after a bill filed for foreclosure (*In re Wilkinson's Mortgaged Estates*, 13 L. R. Eq. 634), have liberty to sell under their power of sale, with a reservation of the mines and minerals in the land sold, and incidental powers of working them; and it is not necessary for mortgagees, in order to exercise the power of selling with such a reservation, to serve the petition on any subsequent incumbrancer: *In re Beaumont's Mortgage Trusts*, 12 L. R. Eq. 86.

The Court has power, under the Confirmation of Sales Act (25 & 26 Vict. c. 108), to give a general direction that persons having powers of sale and exchange in a settlement or will, which do not expressly authorise the reservation of mines and minerals on a sale of the settled property, or a sale of minerals apart from the land, may exercise the powers, as if they did authorise such reservation or separation. *In re Wynn's Devised Estates*, 16 L. R. Eq. 237.

And the Court may make an order on petition, authorising sales of land apart from minerals generally, and without reference to any particular sale. *Re Willway's Trusts*, 32 L. J. Ch. 226; *In re Wynn*, 16 L. R. Eq. 237.

Cestuis que trust ought to be made parties to any application under the Confirmation of Sales Act (25 & 26 Vict. c. 108, s. 2), for sale of the surface, apart from the minerals: (*In re Palmer's Will*, 13 L. R. Eq. 408; and see *In re*

Brown's Trust Estate, 9 Jur. (N. S.) 349; 11 W. R. 19). But it has been held that where trustees of settled land with power of sale, exercisable with consent of the tenant for life, present a petition under that Act, for leave to sell the land and minerals separately, it need not be served on the beneficiaries entitled in remainder: *In re Pryse's Estates*, 10 L. R. Eq. 531.

Lastly, as to what powers will be aided.]—There is no doubt that powers of jointuring, of raising portions, of sale, of revoking uses and generally appointing an estate, will, if defectively executed, be aided.

It was, however, at one time doubted whether defective appointments under powers of leasing would be aided as against the remainderman. See Powell on Powers, 389. Lord *Redesdale*, however, in *Shannon* v. *Bradstreet*, 1 S. & L. 52, held a contract to grant a lease by a tenant for life, according to a power, binding upon a remainderman, although it was objected that a leasing power differs from other powers, inasmuch as in other powers the remainderman has no interest in the mode in which the power is executed, as he claims nothing under it, but that under the leasing power he claims the rent reserved. "On what ground," said his Lordship, "can it be contended that that which is a mere charge upon a remainderman is to receive a more liberal construction than what is not a mere charge upon him, but may be much for his benefit? In the case of powers to make leases at the best rent that can be obtained, it is evident that the author of the power looks to the benefit of the estate, and that the power is given for the benefit both of the tenant for life and of all persons claiming after him; for where the tenant for life can give no permanent interest, and his tenant is liable every day to be turned out of possession by the accident of his death, it is hard to procure substantial tenants; and therefore it is beneficial to all parties that the tenant for life should have a power to grant such leases. . . . . This, therefore, is a power which is calculated for the benefit of the estate. Other powers, generally speaking, such as jointuring powers, and powers to make provisions for younger children, are calculated for the benefit of the family: they may be indirectly beneficial to the remainderman, in some respects, but they are no direct benefit to him; nor can I conceive why these powers should be construed more liberally than powers to make leases, except where it is evident that such power is abused; and in case of letting leases, the power is certainly more liable to be abused than in making provisions for wife or children. In these latter cases, the sum to be

raised is generally limited, and cannot be exceeded; but a power of leasing is, to a certain extent, a power of charging; if a fine is taken, it is unquestionably so; and even where no fine can be taken, it is, to a certain degree, a charge, and for the benefit of tenant for life as well as the remainderman, for tenant for life will get a better rent than if he had no such power. I cannot conceive, therefore, what distinction there is between a leasing power and the other powers before noticed; they are all powers given to the tenant for life for his benefit, to enable him to charge the estate; and in case of a rack-rent, the power of leasing is also a benefit to the remainderman. Now, in case of a jointuring power, and in all the other cases, a contract has been held sufficient to enable a party to have the power executed in equity." See, also, *Doe* v. *Weller*, 7 Term Rep. 478; Willes, 176; *Clark* v. *Smith*, 9 C. & F. 126; and *Dowell* v. *Dew*, 1 Y. & C. C. C. 345, where an agreement to grant a lease was held binding as against a feme covert, as being a defective execution of her power of leasing.

The legislature has also extended the remedies of lessees by the act for granting relief against defects in leases made under powers of leasing in certain cases (12 & 13 Vict. c. 26), suspended in its operation by a subsequent act in the same session until the 1st of June, 1850 (12 & 13 Vict. c. 110), and amended by 13 & 14 Vict. c. 17.

But equity will not aid a defect even in favour of purchasers, if the execution of the power would involve a breach of trust (*Mortlock* v. *Buller*, 10 Ves. 292; *Stratford* v. *Lord Aldborough*, 1 Ridg. 281); —or would be a fraud upon the power: *Harnett* v. *Yielding*, 2 S. & L. 549.

And a power of leasing will not be aided where the best rent has not been reserved, or a fine has been paid, contrary to the requisitions of the power; or where there has been an agreement or covenant to grant a lease, commencing in futuro, where the power authorises only leases in possession, and the donee has died before the estate fell into possession (*Campbell* v. *Leach*, Amb. 740; *Shannon* v. *Bradstreet*, 1 S. & L. 52; *Doe* v. *Weller*, 7 Term Rep. 478; Willes, 176; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345, 356; *Temple* v. *Baltinglass*, Rep. t. Finch, 275). But it seems that when the question is raised, whether the rent reserved is adequate or not, Courts of equity will not decline to aid the imperfect execution of the power of leasing, unless the rent be so low as to afford evidence of fraud: *King* v. *Roney*, 5 Ir. Ch. Rep. 64, 77.

In *Sandham* v. *Medwin*, 3 Swanst. 685, where unusual and unheard-of covenants were intro-

duced into the lease, "usual and reasonable covenants" being required by the power, a Court of equity would not interfere.

If a tenant for life has power to lease, with the consent of trustees or others, an agreement by the tenant for life alone to lease will not be aided: *Lawrenson* v. *Butler*, 1 S. & L. 13. In *Shannon* v. *Bradstreet*, 1 S. & L. 52, where a tenant for life, with power to grant leases "in possession, and not in reversion," entered into an agreement to grant a lease a day or two before the lease was to commence, the tenant for life having survived that time, no objection arose, and the agreement was held by Lord *Redesdale* to be binding upon the remainderman. See, also, *Dowell* v. *Dew*, 1 Y. & C. C. C. 345.

A Court of equity will not grant its aid where there is a defect in the execution of a power under an act of Parliament, which must always be taken strictly; thus, where a tenant in tail made a lease for years, not authorised by 32 Hen. 8, c. 28 (repealed by 19 & 20 Vict. c. 120, s. 35), equity would not make good the defect: *Rosswell's Case*, per Hutton Ro. Abr. 379, fol. 6. See, also, Cowp. 267; 2 Burr. 1146; *Anon.*, 2 Freem. 224.

Non-execution of a power.]—We must, however, distinguish between the defective execution and the non-execution of a power, for a non-execution of a power will not be aided: a person, for instance, is not entitled to the aid of the Court on the ground of the execution of the power having been prevented by the sudden death of the donee: *Piggott* v. *Penrice*, Com. 250; Gilb. Eq. Rep. 138. So, disability to sign from gout has not been aided: *Blockvill* v. *Ascott*, 2 Eq. Ca. Abr. 659, n.; and see *Buckell* v. *Blenkhorn*, 5 Hare, 131. We may, however, except those cases in which the execution of a power has been prevented by fraud, as where the deed creating the power has been fraudulently retained by the person interested in its non-execution, for then it seems equity will afford its aid: 3 Ch. Ca. 83, 84, 122; *Ward* v. *Booth*, cited 3 Ch. Ca. 69. See, also, *Piggott* v. *Penrice*, Prec. Ch. 471; *Vane* v. *Fletcher*, 1 P. Wms. 354; *Luttrell* v. *Olmius*, cited 11 Ves. 683; *Seagrave* v. *Kirwan*, 1 Beat. 157; *Bulkley* v. *Wilford*, 2 C. & F. 102; *Middleton* v. *Middleton*, 1 J. & W. 94.

Defects in the execution of powers cured by statute.] — It may here be mentioned that if a will is in other respects properly executed, probate cannot be refused upon the ground that the power under which it has been made has not been properly followed. See *Barnes* v. *Vincent* (5 Moore, P. C. C. 201), where a decision of the Prerogative Court

refusing probate to the will of a feme covert, on the face of it not executed according to the requisites of the power, was reversed by the Judicial Committee of the Privy Council. "It is certain," said Lord *Brougham*, "that there is a considerable class of cases, in which equity will relieve against a defective execution of a power. Thus in favour of a purchaser; of a creditor; of a child; equity will relieve. But if probate shall have been refused by the Ecclesiastical Court, on the ground of the execution being defective, no such relief can ever be extended in any case; because the Court, which alone can relieve, never can know if the instrument had existed, nor can see the defect in the execution; and the Court of Probate is bound by the fact of the defective execution, and cannot remedy it. Thus a feme covert having made a will in favour of a child, and imperfectly executed it, the child must be excluded, by probate being refused; when, had a Court of equity been put in possession of the instrument, it would have held the defective execution relievable in the child's behalf." See and consider *Este* v. *Este*, 15 Jur. 150; *De Chatelain* v. *De Pontigny*, 1 Swab. & Tr. 411; *Mahon* v. *Hodgens*, 6 I. R. E. 339.

The will in *Barnes* v. *Vincent* was made prior to the passing of the Wills Act (1 Vict. c. 26), and it must be remembered, that by that Act, no appointment made by will, in exercise of any power, will be valid, unless the same be executed with the solemnities required by the Act; but if those are complied with, the appointment will be valid, although some additional or other form of execution or solemnity may have been required by the power. See sects. 9 and 10, *ante*, p. 263.

An appointment by deed is now rendered valid in many cases, although not executed and attested by all the solemnities required by the instrument creating the power. See the Property and Trustees' Relief Amendment Act (22 & 23 Vict. c. 35, s. 12), which enacts that "a deed hereafter executed in the presence of, and attested by, two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution, or attestation, or solemnity: provided always, that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution,

or that any act shall be performed in order to give validity to any appointment having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend."

ELLISON *v.* ELLISON.

Feb. 24th, 1802.

[REPORTED 6 VES. 656.]

VOLUNTARY TRUSTS.]—*Distinction as to volunteers. The assistance of the Court cannot be had without consideration, to constitute a party cestui que trust, as upon a voluntary covenant to transfer stock, &c.; but if the legal conveyance is actually made, constituting the relation of trustee and cestui que trust, as if the stock is actually transferred, &c., though without consideration, the equitable interest will be enforced.*

Settlement of leasehold estates not revoked by a subsequent assignment by the trustee to the settlor entitled for life, or by the will of the latter; no intention to revoke appearing; and the terms of a power of revocation not being complied with.

BY indenture, dated the 1st of July, 1791, reciting a lease, dated the 6th of June preceding, of collieries at Hebburn and Jarrowwood, in the county of Durham, for thirty-one years, to Charles Wren and others; and that the name of Wren was used in trust for Nathaniel Ellison and Wren, in equal shares; it was declared, that Wren, his executors and administrators, would stand possessed of the lease, in trust, as to one moiety, for Ellison, his executors, &c.

By another indenture, dated the 18th of June, 1796, reciting, that Ellison was interested in and entitled to one undivided eighth part of certain collieries at Hebburn and Jarrow, held by two separate leases for terms of thirty-one years, and that he was desirous of settling his interest, he assigned and transferred all his interest in the said collieries, and all the stock, &c., to Wren, his execu-

tors, administrators, and assigns, in trust for Nathaniel Ellison and his assigns during his life; and, after his decease, in trust to manage and carry on the same, in like manner as Wren should carry on his own share; and upon further trust, out of the profits, to pay to Margaret Clavering, during the remainder of the term, in case she should so long live, the yearly sum of 103*l.* 2*s.* 8*d.*, which sum is thereby mentioned to be secured to her by an indenture, dated the 14th of May last; and, subject thereto, in trust to pay thereout to Jane Ellison, in case she should survive Nathaniel Ellison, during the remainder of the term, during the joint lives of Jane Ellison and Anne Furye, the clear yearly sum of 180*l.*; and after the decease of Anne Furye, then the yearly sum of 90*l.*, during the remainder of the term, in case Jane Ellison should so long live; and, subject as aforesaid, upon trust to pay thereout, to each of the children of Nathaniel Ellison that should be living at his decease, during the remainder of the term, during the joint lives of Jane Ellison and Anne Furye, and the life of the survivor, the yearly sum of 30*l.* apiece; and after the decease of the survivor the yearly sum of 15*l.*; and upon further trust to pay the residue of the profits arising from the collieries to the eldest son of Nathaniel Ellison, who should attain the age of twenty-one; and upon the death of Margaret Clavering, then upon trust to pay to each of the children of Nathaniel Ellison the further yearly sum of 10*l.*; with survivorship, in case any of the children should die before twenty-one, or marriage of daughters, provided none except the eldest should be entitled to a greater annuity than 50*l.*; and upon further trust to pay the residue to the eldest son; provided further, in case all the children die before twenty-one, or the marriage of daughters, upon trust to pay the whole to such only child at twenty-one, or marriage of a daughter; provided further, in case the profits to arise from the collieries should not be sufficient to pay all the annuities, the annuitants, except Margaret Clavering, should abate, to be made up whenever the profits should be sufficient;

and upon further trust, in case Wren, his executors or administrators, should think it more beneficial for the family to sell and dispose of the collieries, upon trust to sell and dispose of the same for the most money that could reasonably be got, and to apply the money, in the first place, in payment of all debts due from the collieries, in respect of the share of Ellison; and, subject thereto, to place out the residue on real securities, and apply the interest, in the first place, in payment of the annuity of 103*l.* 2*s.* 8*d.* to Margaret Clavering; then to the annuities of 180*l.* or 90*l.*; then to pay all the children of Ellison, during the life of Margaret Clavering, the yearly sum of 22*l.* 10*s.*, and to pay the residue of the dividends and interest to the eldest son of Ellison, in manner aforesaid; and if the dividends, &c., should not be sufficient for the annuities, the two annuitants, except Margaret Clavering, to abate; and, after her death, to pay to each of the children of Nathaniel Ellison the further yearly sum of 2*l.* 10*s.* for their lives; and, after the decease of Margaret Clavering and Jane Ellison, upon trust to pay to each of the children of Nathaniel Ellison the sum of 500*l.*, in case the money arising from the sale should be sufficient; then upon trust to divide the same equally among all the children, share and share alike; and, subject as aforesaid, to pay over the residue to the eldest son on his attaining twenty-one; and it was declared, that the portions of the children should be paid to the sons at twenty-one, to the daughters at twenty-one or marriage; and in case of the death of any before such period, to pay that share to the eldest son at twenty-one; and if only one child should survive, to pay the whole to such one at twenty-one or marriage, if a daughter; and in case all die before twenty-one, &c., then the said Charles Wren, his executors and administrators, shall stand possessed of the said collieries, and the money to arise by sale thereof, subject as aforesaid, in trust for Nathaniel Ellison, his executors, administrators, and assigns. It was further declared, that the annuities should be paid half-yearly; and that, upon any such sale, the receipt of Wren, his

executors or administrators, should be a sufficient discharge to purchasers. Then followed this proviso :— "Provided always and it is hereby further declared, that it shall and may be lawful for the said Nathaniel Ellison, by any deed or deeds, writing or writings, to be by him signed, sealed, and delivered in the presence of and *attested by two or more credible witnesses,* to revoke, determine, and make void all and every the uses, trusts, limitations, and powers hereinbefore limited and created, of and concerning the said collieries and coal mines; and by the same deed or deeds, or by any other deed to be by him executed in like manner, to limit any new or other uses of the said collieries and coal mines, as he, the said Nathaniel Ellison shall think fit."

By another indenture, dated the 3rd of July, 1797, *but not attested by two witnesses,* reciting the leases of the collieries, and that the name of Charles Wren was used in trust for Nathaniel Ellison and himself, in equal shares, and that Ellison had advanced an equal share of the monies supplied for carrying on the collieries, amounting to 9037*l.* 10*s.*, it was witnessed, that, in consideration of 4518*l.* 15*s.*, Wren assigned to Nathaniel Ellison one undivided moiety or half part of all the said collieries, demised to him by the said several leases, with a like share of the stock ; to have and to hold the said collieries to Ellison, his executors, administrators, and assigns, for the residue of the said terms, subject to the rents, covenants, and agreements in the said leases ; and to have and to hold the stock unto Ellison, his executors, administrators, and assigns, to and for his and their own proper use for ever, with the usual covenants from Wren as to his title to assign, &c., and from Ellison to indemnify Wren, his executors, &c.

Nathaniel Ellison, by his will, dated the 22nd June, 1796, after several specific and pecuniary legacies, gave all the rest and residue of his personal estate and effects, of what nature or kind soever, not before disposed of, to his wife, and Wren, and the survivor, and the executors and administrators of such survivor, upon trust to call in

and place the same out in the funds, or on real securities; and he directed that all sums of money which should come to the hands of his wife and Wren, or of the executors, &c., of either of them, under the said trusts, should be equally divided between all his children, sons and daughters, born and to be born, share and share alike; the shares to become vested and be payable upon marriage, with consent of their guardians, and not otherwise, until the age of twenty-one; such part of the interest in the meantime, as the guardians shall think proper, to be applied for maintenance; the residue to accumulate; with a direction for payment of part of the principal for advancement, and survivorship upon the death of any before the respective shares should be payable; and, in case of the death of all under age and unmarried, he gave the dividends and interest to his wife for life; and, upon her death, he gave the principal and a sum of 3000*l.*, charged upon her estates, to his sister, Margaret Clavering, and his nephew. Then, after some further dispositions of stock in favour of his children, he gave a legacy of twenty guineas to Wren, and appointed his wife and Wren executors and guardians.

The testator died in 1798, leaving his widow and ten children surviving; one of whom, Charles Ellison, died in 1799, an infant. Wren also died in that year.

The bill was filed by the testator's widow and Margaret Clavering, praying, that the trusts of the deed of June, 1796, may be established, and that new trustees may be appointed.

The younger children, by their answer, submitted whether the trusts of that deed were not varied or revoked by the deed of July, 1797.

Mr. *Romilly* and Mr. *Bell*, for the plaintiffs, insisted, that the subsequent deed, not reciting or taking any notice of the prior settlement, could not revoke it; that it was not the object of the latter deed to revoke the former; and that it was not attested by two witnesses, as, in order to effect a revocation, it ought to be.

Mr. *Richards*, for the eldest son, defendant, claiming also under the deed of 1796, declined to argue the case.

Mr. *Steele* and Mr. *W. Agar*, for the other defendants, the younger children.—Though the expression in the clause of revocation is "deed or writing," a will with two witnesses would do, according to the case (*a*) from Ireland, cited in *Lord Darlington* v. *Pulteney* (*b*). No intention, however, can be found in the will to revoke this settlement; but the subsequent deed is an implied revocation. What use could there be in that deed but to give Ellison the absolute estate, which is quite inconsistent with the trusts of the former deed, which are very special, and give a large discretion? An instrument may be revoked by another, though not taking notice of the former, but only making a disposition inconsistent with it: *Lord Fauconberge* v. *Fitzgerald* (*c*), *Arnold* v. *Arnold* (*d*). And though the latter of these cases was upon a will, there is no difference upon a voluntary settlement. There is no instance in which a voluntary deed, defective, and not effectual at law, has been aided in this court; and though this is, in some respects, in favour of a wife and children, one of the parties claiming under it is a volunteer; and it is opposed by nine out of ten children. This deed, like that in *Colman* v. *Sarrel* (*e*), cannot be proceeded upon at law. But if the trust was originally well created, yet if the subject gets back, and is vested in the author of the trust, the objection lies.

(*a*) *Roscommon* v. *Fowke*, 6 Bro. P. C., Toml. ed. 158.
(*b*) Cowp. 268.
(*c*) 6 Bro. P. C. 295, Toml. ed.
(*d*) 1 Bro. C. C. 401.
(*e*) 1 Ves. jun. 50; *S. C.* 3 Bro. C. C. 12.

Mr. *Romilly*, in reply.—Can it be stated as a question here, whether a settlement for a wife and children can be enforced against the representative of the father or the husband? *Colman* v. *Sarrel* has not the most remote application; the parties claiming under the deed being mere strangers, except by a connection illegal and immoral. It is not necessary to consider the case of a mere volunteer. Mrs. Clavering was a creditor by an annuity secured by a prior deed. Supposing Ellison had an intention to revoke this settlement, he had prescribed to himself certain forms, the attestation of two witnesses. There is no instance of an implied revocation of trusts,

which are only to be revoked expressly, by a particular certain form. But there is not the least pretence upon these instruments, either the deed or the will, of any such intention. The will was executed only four days after the settlement, which is not noticed in either instrument. It is no more than consenting that the trustee, having the legal interest, shall assign to another person, and taking it himself. Notwithstanding the length the Court have gone upon wills (*a*), this would not be a revocation even of a will, merely taking the legal interest, having disposed of the equitable. The intention that these trusts should not prevail would have been expressly declared. As far as Wren was a trustee, the deed is revoked; but it was the act of Wren, Ellison being passive.

(*a*) See *Harmood* v. *Oglander*, 6 Ves. 199, and note.

Lord Chancellor Eldon.—I had no doubt, that, from the moment of executing the first deed, supposing it not to have been for a wife and children, but for pure volunteers, those volunteers might have filed a bill in equity, on the ground of their interest in that instrument, making the trustees and the author of the deed parties. *I take the distinction to be, that, if you want the assistance of the Court to constitute you cestui que trust, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you cestui que trust: as, upon a covenant to transfer stock, &c., if it rests in covenant, and is purely voluntary, this Court will not execute that voluntary covenant. But if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court.* That distinction was clearly taken in *Colman* v. *Sarrel* (*b*), independent of the vicious consideration. I stated the objection, that the deed was voluntary; and the Lord Chancellor (*c*) went with me so far as to consider it a good objection to executing what remained in covenant. But if the actual transfer is made, that constitutes the relation between trustee and cestui que trust, though voluntary, and without good or *meritorious* (*d*) consideration; and it is clear, in that case, that, if the stock had been

(*b*) 1 Ves. jun. 50; *S. C.* 3 Bro. C. C. 12.

(*c*) *Thurlow.*

(*d*) That meritorious consideration merely will not entitle a volunteer to the aid of equity. See *Jefferys* v. *Jefferys*, 1 Cr. & Ph. 138; *Dillon* v. *Coppin*, 4 My. & Cr. 647, overruling *Ellis* v. *Nimmo*, L. & G. 333, t. Sugd.

actually transferred, unless the transaction was affected by the turpitude of the consideration, the Court would have executed it against the trustee and the author of the trust.

In this case, therefore, the person claiming under the settlement might maintain a suit, notwithstanding any objection made to it as being voluntary, if that could apply to the case of a wife and children; considering, also, that Mrs. Clavering was an annuitant, and not a mere volunteer. But it was put for the defendants thus—that though the instrument would have been executed originally, if the subject got back by accident into the author of the trust, and was vested in him, then the objection would lie in the same manner as if the instrument was voluntary. I doubt that, for many reasons—the trust being once well created, and whether it would apply at all where the trust was originally well created, and did not rest merely in engagement to create it. Suppose Wren had died, and had made Ellison his executor, it would be extraordinary to hold, that though an execution would be decreed against him as executor, yet, happening to be also author of the trust, therefore an end was to be put to the interest of the cestui que trust. But it does not rest there; for Ellison clothes the legal estate remaining in Wren with the equitable interests declared by the first deed, making him, therefore, a trustee for Ellison himself first, and, after his death, for several other persons; and he has said, he puts that restraint upon his own power, not only that he shall not have a power of revocation whenever he changes his intention, but that he shall not execute that power, nor be supposed to have that change of intention, unless manifested by an instrument executed with certain given ceremonies. My opinion is, that if there is nothing more in this transaction than taking out of Wren the estate clothed with a trust for others with present interests, though future in enjoyment, and that was done by an instrument with no witness, or only one witness, it is hardly possible to contend that such an instrument would be a revocation

according to the intention of the party, the evidence of whose intention is made subject to restrictions that are not complied with. The only difficulty is, that the declaration of the trusts in the first instrument could not be executed, the second instrument being allowed to have effect. It is said, a power was placed in Wren, his executors and administrators, not his assigns, if in sound discretion thought fit, to sell and to give a larger interest to the younger children than they otherwise would take. If Wren had not, after the re-assignment, that discretion still vested in him, I think it would not be in the executors of Ellison, and it could not be exercised by the Court, though, *in general cases, trusts will not fail by the failure of the trustee.* But, though the effect would be to destroy the power of Wren, which I strongly doubt, attending to the requisition of two witnesses, I do not know that it would destroy the other interests. I think, therefore, upon the whole, this trust does remain, notwithstanding this re-assignment of the legal estate to Ellison. I do not think, consistently with the intention expressed in the first instrument, and the necessity imposed upon himself of declaring a different intention under certain restrictions, that, if a different intention appeared clearly upon the face of the instrument, the latter would have controlled the former. But I do not think his acts do manifest a different intention. Supposing one witness sufficient, the second deed does not sufficiently manifest an intention to revoke all the benefits given by the first deed to the children; and it is not inconsistent that he might intend to revoke some, and not all.

As to the will, it is impossible to maintain that the will is a writing within the meaning of the power, considering how the subject is described. The word "residue" there means that estate of which he had the power of disposing, not engaged by contracts, declarations of trusts, &c. It was necessary for him to describe the subject in such a way that there could be no doubt he meant to embrace that property. Upon the whole, therefore, this relief

must be granted; *though I agree, that, if it rested in covenant, the personal representative might have put them to their legal remedies*, he cannot, where the character of trust attached upon the estate while in Wren; which character of trust, therefore, should adhere to the estate in Ellison, unless a contrary intention was declared; and the circumstance of one witness only, when the power reserved required two witnesses, is also a circumstance of evidence that he had not the intention of destroying those trusts which had attached, and were then vested in the person of Wren.

The ordering part of the decree, extracted from the Registrar's Book, is thus (*a*): "Whereupon, and upon debate of the matter, and hearing the deed of trust dated the 18th June, 1796, read, and what was alleged by the counsel on both sides, his lordship doth declare that the trust of the said deed, bearing date 18th June, 1796, ought to be performed and carried into execution, and doth order and decree the same accordingly. And it is further ordered and decreed, that it be referred to Mr. Ord, one of the Masters of this Court, to appoint a new trustee or trustees of the premises comprised in the said trust deed, and that the share of the said Nathaniel Ellison of and in the said collieries, and the stock and effects belonging thereto comprised in the said deed, be assigned to such new trustee or trustees so to be appointed, upon the trusts and upon and for the intents and purposes declared by the said deed concerning the same, and such new trustee or trustees is or are to declare the trust thereof accordingly, and the said Master is to settle such assignment; and it is ordered that the said Master do tax all parties their costs in this suit, and that such costs, when taxed, be paid out of the estate of the said testator, and any of the parties are to be at liberty to apply to this Court as there shall be occasion."

(*a*) Taken from the judgment of Lord Justice Knight Bruce in *Kekewich* v. *Manning*, 1 De G. Mac. & G. 191.

In the leading case of *Ellison* v. *Ellison*, Lord *Eldon* lays down and acts upon the well-known rule, that where a trust is actually created,

and the relation of trustee and cestui que trust established, a Court of equity will, in favour of a volunteer, enforce the execution of the trust against the person creating the trust, and all subsequent volunteers; although it will not create a trust or establish the relationship of trustee and cestui que trust, by enforcing the performance of an agreement, or by giving effect to an imperfect conveyance or assignment in favour of volunteers. The application, however, of this rule, is by no means free from difficulty, as it is frequently a question of much nicety to determine whether the relation of trustee and cestui que trust has or not been established. It is intended, therefore, in this note to examine the cases in which equity interposes or refuses its aid in favour of volunteers.

Where there has been an actual bonâ fide transfer of the legal interest in real or personal property by the settlor or his trustees to trustees upon trusts declared in favour of volunteers, these trusts, it is clear, will be enforced in equity against the settlor or his representatives or subsequent volunteers (*Colman* v. *Sarrel*, 3 Bro. C. C. 12, 14; *S. C.*, 1 Ves. jun. 50; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84, 99; *Bill* v. *Cureton*, 2 My. & K. 503; *Jefferys* v. *Jefferys*, Cr. & Ph. 138, 141; *Dening* v. *Ware*, 22 Beav. 184; *Muggeridge* v. *Stanton*, 7 W. R. (V.-C. K.) 638; *Dilrow* v. *Bone*, 3 Giff. 538); even although, as in the principal case, the trust property by accident gets back into the hands of the donor (*Smith* v. *Lyne*, 2 Y. & C. C. C. 345; *Browne* v. *Cavendish*, 1 J. & L. 637; *Newton* v. *Askew*, 11 Beav. 145. And see *Page* v. *Horne*, 11 Beav. 227; *Lanham* v. *Piric*, 2 Jur. N. S. 753, 3 Jur. N. S. 704; *Gilbert* v. *Overton*, 2 Hem. & Mill. 117); to whom if it were transferred by the trustees they would commit a breach of trust: *M'Donnell* v. *Hesilrige*, 16 Beav. 346.

Where there is a clear intention on the part of the donor of giving, a legal transfer of the subject-matter of the gift to the donee will be valid, although it was not knowingly made to him for the purpose of carrying out the gift; see *Strong* v. *Bird*, 18 L. R. Eq. 315. There the defendant borrowed 1,100*l.* from his stepmother, who lived in his house, paying him 212*l.* 10*s.* a quarter for board; and it was agreed that the debt should be paid off by a deduction of 100*l.* from each quarter's payment. Deductions of this amount were made for two quarters, but on the third quarter day the creditor refused to make any further deduction, and paid the full amount of 212*l.* 10*s.*, and continued down to the time of her death (which took place more than four years afterwards) to pay to the defendant the like quarterly sum. The defendant was appointed sole executor of his step-

mother, and proved the will. A suit for administration having been instituted, it was held by Sir *G. Jessel*, M. R., that the debt was gone, because the appointment of the defendant as executor released the debt at law, and any claim in equity was rebutted by evidence of a continuing intention on the part of the testatrix to give. "The question," said his Honour, "is, Did the law allow her to make this a complete gift without doing more than she actually did? First of all, it is said, and said quite accurately, that the mere saying by a creditor to a debtor 'I forgive you the debt,' will not operate as a release at law. It is what the law calls *nudum pactum*, a promise made without an actual consideration passing, and which consequently cannot be supported as a contract. It is not a release, because it is not under seal; therefore, the mere circumstance of saying 'I will forgive you' will not do . . . . First of all, we must consider what the law requires. The law requires nothing more than this, that in a case where the thing which is the subject of donation is transferable or releasable at law, the legal transfer or release shall take place. The gift is not perfect until what has been generally called a change of the property at law has taken place. Allowing that rule to operate to its full extent, what occurred was this. The donor, or alleged donor, had made her will, and by that will had appointed the defendant, the alleged donee, executor. After her death he proved the will, and the legal effect of that was to release the debt in law, and therefore the condition which is required, namely, that the release shall be perfect at law, was complied with by the testatrix making him executor. It is not necessary that the legal change shall knowingly be made by the donee with a view to carry out the gift. It may be made for another purpose; but if the gift is clear, and there is to be no recall of the gift, and no intention to recall it, so that the person who executes the legal instrument does not intend to invest the person taking upon himself the legal ownership with any other character, there is no reason why the legal instrument should not have its legal effect. For instance, suppose this occurred, that a person made a memorandum on the title deeds of an estate to this effect: 'I give Blackacre to A. B.,' and afterwards conveyed that estate to A. B. by a general description, not intending in any way to change the previous gift, would there be any equity to make the person who had so obtained the legal estate a trustee for the donor? The answer would be, that there is no resulting trust; that is rebutted by showing that the person who conveyed did not intend the person taking the con-

veyance to be a trustee; and although the person conveying actually thought that that was not one of the estates conveyed, because that person thought that he had well given the estate before, still the estate would pass at law, notwithstanding that idea, and there being no intention to revoke the gift, surely it would get rid of any resulting trust. On the same principle, where a testator makes his debtor executor, and thereby releases the debt at law, he is no longer liable at law. It is said that he would be liable in this Court; and so he would, unless he could show some reason for not being made liable. Then, what does he show here? Why he proves to the satisfaction of the Court a continuing intention to give; and it appears to me that there being the continuing intention to give, and there being a legal act which transferred the ownership or released the obligation—for it is the same thing—the transaction is perfected, and he does not want the aid of a Court of equity to carry it out, or to make it complete, because it is complete already, and there is no equity against him to take the property away from him."

Where, although there has been an intended transfer to trustees, the trusts have not been finally determined upon by the settlor, he has a locus pœnitentiæ, and may call for a re-transfer: *Re Sykes' Trusts*, 2 J. & H. 415.

Where, moreover, a legal transfer of property has been made to trustees, for payment *of the debts* of the owner without the knowledge or concurrence of his creditors, such a transaction, it has been repeatedly held, does not invest creditors with the character of cestuis que trust, but amounts merely to a direction to the trustees as to the method in which they are to apply the property vested in them for the benefit of the *owner* of the property, who alone stands towards them in the relation of cestui que trust, and can vary or revoke the trusts at pleasure, especially when the payment of the debts is only to be made on the request of the settlor (*Evans* v. *Bagwell*, 2 Con. & L. 612); but without prejudice to anything which the trustees have done in the proper performance of their duties: *Wilding* v. *Richards*, 1 Coll. 655, 659; *Kirwan* v. *Daniel*, 5 Hare, 493. Courts of equity, therefore, will not, at the instance of the creditors, who are looked upon as mere strangers, compel the trustees to execute the trusts for payment of debts. Thus, in *Walwyn* v. *Coutts*, 3 Mer. 707, *S. C.*, 3 Sim. 14, where estates were conveyed to trustees upon trust for the payment of the debts of certain scheduled creditors, who were *neither parties nor privies to the deed*, Lord *Eldon* held, that the trust was voluntary, and that it could not be enforced against the owners of

the estates, who might vary it as they pleased. So, also, in *Garrard* v. *Lord Lauderdale*, 3 Sim. 1, where an assignment of personal property was made to trustees for payment of certain scheduled creditors *who were parties to, but who neither executed nor were privy to the execution of the deed*, Sir *L. Shadwell*, V.-C., *although the execution of the deed had been communicated to the creditors*, upon the authority of *Walwyn* v. *Coutts*, held, that they had no right to enforce the trusts of the deed, and he considered that the principle of the two decisions of *Ellison* v. *Ellison* and *Walwyn* v. *Coutts* were reconcilable with each other; "because," said his Honour, "I apprehend that Lord *Eldon* must have considered that, where a person does, without the privity of any one, without receiving consideration, and without notice to any creditor, himself make a disposition, as between himself and trustees, for the payment of his debts, he is merely directing the mode in which his own property shall be applied for his own benefit, and that the general creditors, or the creditors named in the schedule, are merely persons named there for the purpose of shewing how the trust property under the voluntary deed shall be applied for the benefit of the volunteers." This case was, on appeal, affirmed by Lord *Brougham*: 2 Russ. & My. 451. So, likewise, Sir *J. Leach*, M. R., in *Acton* v. *Woodgate*, 2 My. & K. 495, held, that a conveyance to trustees for the benefit of creditors, who were neither parties nor privies to it, was revoked by a second conveyance, executed by several creditors, not privy to the first. In *Page* v. *Broom*, 4 Russ. 6, a debtor had by deed poll directed the receiver of his estate to pay the interest of a particular debt: it was held by Sir *J. Leach*, M. R., that, as the deed was executed without consideration, and without the privity of the creditor, no trust was created in his favour. This case was affirmed on appeal by Lord *Brougham*. See 2 Russ. & My. 214. In *Bill* v. *Curcton*, 2 My. & K. 511, Lord *Cottenham*, then Master of the Rolls, with reference to the cases of *Walwyn* v. *Coutts* and *Garrard* v. *Lord Lauderdale*, observes, "that these two cases, so far from deciding that a cestui que trust becoming entitled under a voluntary settlement had not a good title against the settlor, proceeded upon this, that the character of trustee and cestui que trust never existed between the creditor and the trustees of the trust deeds, but that the settlor himself was the only cestui que trust, and therefore that he was entitled to direct the application of his own trust fund." In *Gibbs* v. *Glamis*, 11 Sim. 584, a suit was instituted by A. against B. & C. respecting a sum of 4000*l*. D. was also made a party to the suit; but, having no interest, he disclaimed. A., B.,

and C. afterwards came to a compromise; in pursuance of which they executed a deed, assigning the 4000*l.* to trustees, in trust to pay D. his costs of the suit, and to divide the rest of the fund amongst A., B., and C. D., though he was not a party either to the compromise or to the deed, filed a bill against A., B., and C., and the trustees, to compel a performance of the trusts and payment of his costs. Lord *Cottenham*, reversing the decision of Sir *L. Shadwell*, V.-C., allowed the demurrer of C. for want of equity, observing, "that the question was, whether the provision for payment of costs gave the party whose costs were so provided for a right to institute a suit as cestui que trust, he having no interest in the fund, not having been a party to the arrangement, and the arrangement having been made between the parties interested in the fund, for their own benefit or convenience; that the present case was not distinguishable from *Garrard* v. *Lord Lauderdale*, and the other cases which had been cited, in each of which the plaintiff was as much a cestui que trust as the plaintiff in that case was. See also *Ravenshaw* v. *Hollier*, 7 Sim. 3; *Wilding* v. *Richards*, 1 Coll. 655; *Law* v. *Bagwell*, 4. D. & W. 398; *Browne* v. *Cavendish*, 1 J. & L. 635; *Simmonds* v. *Palles*, 2 J. & L. 489; and the observations of Sir *Edward Sugden* in the last case on *Gibbs* v. *Glamis*; *Smith* v. *Hurst*, 10 Hare, 30; *Steele* v. *Murphy*, 3 Moore, P. C. C. 445; *Smith* v. *Keating*, 6 C. B. 136, 158; *Thayer* v. *Lister*, 9 W. R. (V.-C. W.) 360; *Henriques* v. *Bensusan*, 20 W. R. (V.-C. M.) 350.

It is clear also, that, in other cases in which creditors are not concerned, a person not intending to give or part with the dominion over his property, may retain such dominion, notwithstanding he may have vested the property in trustees, and declared a trust upon it in favour of third persons. Thus, in *Hughes* v. *Stubbs*, 1 Hare, 476, a testatrix drew a cheque on her bankers for 150*l.* in favour of A., and she verbally directed A. to apply that sum, or so much of it as might be necessary, to make up to a legatee the difference in value between a legacy of 100*l.* which the testatrix, by her will, had given to the legatee, and the price of a 100*l.* share in a certain railway: the testatrix informing A. that she intended to give the share instead of the legacy, but she did not think it necessary to alter her will. The bankers gave credit to A. for the 150*l.* The testatrix afterwards died. In a suit for the administration of her estate, Sir *J. Wigram*, V.-C., held, that no trust was created for the benefit of the legatee in respect of the 150*l.* "The cases," observed his Honor, "on this subject are necessarily of difficulty; but the conclusion to which I feel bound to come is, that the testatrix did not part with her

property in the sum in question, or create any trust for the legatee." See also *Gaskell* v. *Gaskell*, 2 Y. & J. 502; *Paterson* v. *Murphy*, 11 Hare, 88; *Smith* v. *Warde*, 15 Sim. 56; and the remarks of *Wood*, V.-C., in *Vandenberg* v. *Palmer*, 4 K. & J. 214, 218; *Pedder* v. *Mosely*, 31 Beav. 159.

Where however a trust in favour of creditors has been acted upon (*Cosser* v. *Radford*, 1 De G. Jo. & Sm. 585), or has been communicated to the creditors, it can no longer be revoked by the settlor. This was laid down in *Acton* v. *Woodgate*, 2 My. & K. 495, by Sir *John Leach*, M. R., who said, that, in the case of *Garrard* v. *Lord Lauderdale*, it seemed to have been considered that a communication by the trustees to creditors of the fact of such a trust would not defeat the power of revocation by the debtor, but that it appeared to him that such a doctrine was questionable, because the creditors, being aware of such a trust, might be thereby induced to a forbearance in respect of their claims, which they would not otherwise have exercised. Other judges have taken the same view as Sir *J. Leach*, as to the effect of the communication of the deed to the creditors (see *Browne* v. *Cavendish*, 1 J. & L. 635; *Simmonds* v. *Palles*, 2 J. & L. 504; *Kirwan* v. *Daniel*, 5 Hare, 499; *Harland* v. *Binks*, 15 Q. B. 713), which it would seem must be clearly proved (*Cornthwaite* v. *Frith*, 4 De G. & Sm. 552), but where an assignment is made to a creditor in trust for himself and other creditors, it cannot be revoked by the assignor after it has been communicated to the assignee, unless he has done something to shew his dissent: *Siggers* v. *Evans*, 5 Ell. & B. 367, 380, 381; *Lawrence* v. *Campbell*, 7 W. R. (V.-C. K.) 170; *Hobson* v. *Thelluson*, 2 L. R. Q. B. 642.

And where property had been conveyed upon trust for payment of debts to a person who was *surety* for some of the debts, it was held, although the conveyance was a mere deed of agency, and not binding on the creditors, who were neither parties nor privies thereto, that the person to whom the property had been so conveyed was entitled to retain it, until he should be discharged from his liability as surety: *Wilding* v. *Richards*, 1 Coll. 655. And it seems to be doubtful whether, after the trust has been communicated to some of the creditors, it can after satisfying them be revoked by the settlor as to the other creditors. See *Griffith* v. *Ricketts*, 7 Hare, 307.

The execution, however, of a trust deed for (amongst other things) the payment of creditors does not constitute one of the creditors, who becomes so after the execution of the deed, and was not a party to it, a cestui que trust, entitled to call on the trustee to execute the trusts of the deed:

La Touche v. *Earl of Lucan*, 7 C. & F. 772.

Where a creditor is party to a deed whereby his debtor conveys property to a trustee to be applied in liquidation of the debt due to that creditor, the deed is, as to that creditor, irrevocable. A valid trust is created in his favour, and the relation between the debtor and trustee is no longer that of mere principal and agent (per Lord *Cranworth*, V.-C., in *Mackinnon* v. *Stewart*, 1 Sim. N. S. 88, and see *Glegg* v. *Rees*, 7 L. R. Ch. App. 71). And that which is true where a single creditor is the cestui que trust, is at least equally so where there are many creditors. Nor does the creditor executing the deed become less a cestui que trust, because he gives nothing to the debtor, as a consideration for the trust created in his favour, or because it was the voluntary, unsolicited act of the debtor to create the trust: (per Lord *Cranworth*, V.-C., in *Mackinnon* v. *Stewart*, 1 Sim. N. S. 88; see, also, *Field* v. *Lord Donoughmore*, 2 Dru. & Walsh, 630, 1 Dru. & War. 227; *Gurney* v. *Lord Oranmore*, 4 Ir. Ch. Rep. 470; 5 Ir. Ch. Rep. 436;) or because he was party to the deed in another right (*Montefiore* v. *Browne*, 7 Ho. Lo. Ca. 241, 266).

And though there is a time limited in the deed within which creditors must execute it, if by accident any of them fail to do so, they will not necessarily, in equity at any rate, should they act under the deed (*Spottiswoode* v. *Stockdale*, Sir G. Coop. Rep. 102; *Raworth* v. *Parker*, 2 K. & J. 163), or upon the faith of it (*Nicholson* v. *Tutin*, 2 K. & J. 18), or acquiesce in it (*In re Baber's Trusts*, 10 L. R. Eq. 554), be excluded from the benefit of the trusts (*Dunch* v. *Kent*, 1 Vern. 260; *Field* v. *Lord Donoughmore*, 1 Dru. & War. 227; and see *Lane* v. *Husband*, 14 Sim. 661; *Whitmore* v. *Turquand*, 1 J. & H. 444; 3 De G. F. & Jo. 107; *Biron* v. *Mount*, 24 Beav. 642), though they might not be allowed to disturb any dividend already made amongst the creditors (*Broadbent* v. *Thornton*, 4 De Gex & Sm. 65; *Field* v. *Cook*, 23 Beav. 600); but the Court, before it permits a creditor, who has not executed to take a benefit under a deed, is bound to see that he has performed all the fair conditions of such deed, and if he has taken any step inconsistent with its provisions, he will be deprived of all advantage therefrom (*Field* v. *Lord Donoughmore*, 1 Dru. & War. 227; *Drever* v. *Mawdesley*, 16 Sim. 511; *Forbes* v. *Limond*, 4 De G. M. & G. 298).

A creditor who for a long time delays (*Gould* v. *Robertson*, 4 De G. & Sm. 509), or if he refuses, to execute such deed within the time limited, and does not retract his refusal within such time (*Johnson* v. *Kershaw*, 1 De G. & Sm. 260), and à fortiori if he has set up a title adverse to the deed (*Watson*

v. *Knight*, 19 Beav. 369; *Brandling* v. *Plummer*, 6 W.R. (V.-C. K.) 117), will not be allowed to claim the benefit of its provisions.

The principle according to which property vested in trustees for the purpose of distribution among creditors, is revocable on the ground of its being a mere arrangement for the benefit of the settlor and which he can therefore at any time revoke, will not, it seems, be applied as between the settlor and persons who are purely the objects of his bounty, the former having appointed an agent to administer the bounty, and declared for whom it was intended (*Paterson* v. *Murphy*, 11 Hare, 88); nor to a case where the trust is to come into operation only on the death of its author, and where, subject to the trust for payment of debts, the lands charged are conveyed by way of bounty to a third person, inasmuch as in such a case the settlor must *primâ facie* be understood to be dealing with his property as if he were disposing of it by will, and therefore as contemplating bounty throughout. *Synnot* v. *Simpson*, 5 H. L. Cas. 121, 139, 141. But see *Montefiore* v. *Browne*, 7 Ho. Lo. Ca. 241, 266; *Burrowes* v. *Gore*, 6 Ho. Lo. Ca. 907.

Where a debtor assigns property for the benefit of his creditors, although no creditor may be aware of the assignment, the assignee may, nevertheless, take proceedings in equity to recover the property (*Glegg* v. *Rees*, 7 L. R. Ch. App. 70).

Trust deeds for the benefit of creditors, in default of registration, either under the 192nd or 194th sections of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134, repealed by 32 & 33 Vict. c. 83, except as to its past operation), cannot be received in evidence.

In order to pass property in chattels verbally by way of gift irrevocably, it has been laid down in some cases that there must also be a delivery from the donor to the donee. Hence, where there were words of gift, but the chattels remained in the possession of the donor (*Irons* v. *Smallpiece*, 2 B. & Ald. 551), or even when they were in the possession of the donee at the time of the gift, so that no delivery was made (*Shower* v. *Pilck*, 4 Exch. 478), it was held that no property passed therein to the donee. In other cases it has been held, that a donatio inter vivos as distinguished from a donatio mortis causâ does not require actual delivery, and it is sufficient to complete a gift inter vivos that the conduct of the parties should show that the ownership in the chattels has been changed. *Flory* v. *Denny*, 7 Exch. 583; *Ward* v. *Audland*, 16 M. & W. 862; *Winter* v. *Winter*, 9 W. R. (Q. B.) 747.

A gift, however, of chattels inter vivos, if made by deed, is complete without any delivery by the

donor or acceptance by the donee, until disclaimer by the latter (*Siggers* v. *Evans*, 5 Ell. & Bl. 367); but such disclaimer may be by parol. Shep. Touch. 285.

In *Farington* v. *Parker*, 4 L. R. Eq. 116, under a settlement certain jewels were assigned upon trust for such person as Mrs. Glegg should by writing direct or appoint, and in default of such appointment, upon trust for her during her life for her separate use, and to be at her absolute disposal, and her receipt or that of the person to whom she should direct the jewels to be delivered, to be a good discharge. Mrs. Glegg, without any direction in writing, delivered the jewels as an absolute gift to her daughter, Lady St. Vincent, who retained them in her possession. It was held by Lord *Romilly*, M. R., that under the gift and manual delivery Lady St. Vincent was absolutely entitled to the jewels.

The delivery by the donor to the donee of securities transferable by delivery, will, with words of gift, constitute a valid donation (*M'Culloch* v. *Bland*, 2 Giff. 428).

The result will be the same in the case of cheques (*Bromley* v. *Brunton*, 6 L. R. Eq. 275); but it must be shewn that the donee received them as gifts. Thus, in *Bromley* v. *Brunton*, 6 L. R. Eq. 275, a cheque was given by A. to B., and presented without delay. The bankers had sufficient assets of A., but refused payment because they doubted the signature. The next day A. died, the cheque not having been paid. It was held by Sir *John Stuart*, V.-C., to be a complete gift *inter vivos* of the amount of the cheque, and ordered its payment, with interest, by the executors of the donor.

But when the evidence shews that a cheque intended as a gift was accepted only as a loan, it cannot afterwards be set up as a gift. *Hill* v. *Wilson*, 8 L. R. Ch. App. 888.

Although there has been no actual transfer of the legal interest in property to trustees, if the settlor has constituted himself a trustee for volunteers, a Court of equity will enforce the trusts. This is well illustrated in *Ex parte Pye*, *Ex parte Dubost*, 18 Ves. 140, 145. In that case M. had, by letter, directed an agent in Paris to purchase an annuity for a lady, which was accordingly purchased, but in the name of M., the lady being at that time married, and also deranged. M. afterwards sent to his agent a power of attorney authorising him to transfer the annuity into the lady's name, but died before the transfer was made. Lord *Eldon* held, that, although the legal interest remained in M., he had constituted himself a trustee for the lady. "The question," says his Lordship, "involves the point, whether the power of attorney amounts here to a declaration of trust? It is clear that this Court will not

assist a volunteer; yet, if the act is completed, though voluntary, the Court will act upon it. It has been decided, that, upon an agreement to transfer stock, this Court will not interpose; but, if the party had declared himself to be the trustee of that stock, it becomes the property of the cestui que trust without more, and the Court will act upon it. Upon the *documents* before me, it does appear, that, though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what *seems to me a sufficient declaration that he held this part of the estate in trust for the* annuitant." And see and consider *Airey* v. *Hall*, 2 Sm. & G. 315; *Parnell* v. *Hingston*, 3 Sm. & G. 337; and *Kiddell* v. *Farnell*, 3 Sm. & G. 428, appealed and compromised, 5 W. R. (L. J.) 793. In *Wheatley* v. *Purr*, 1 Kee. 551, H. O. directed her bankers to place 2000*l.* in the joint names of her children, J. R. W., M. W., and H. W., and her own as trustee for her children. That sum was accordingly entered in the books of the bankers to the account of H. O. as trustee for J. R. W., M. W., and H. W. The bankers gave H. O., as trustee for J. R. W., M. W., and H. W., a promissory note for the amount, with interest at $2\frac{1}{2}$ per cent., and she gave the bankers a receipt for the promissory note. Lord *Langdale*, M. R., was of opinion that she had constituted herself a trustee for the plaintiffs, her children, and that a trust was completely declared, so as to give them a title to relief. See, also, *Vandenberg* v. *Palmer*, 4 K. & J. 204; *Evans* v. *Jennings*, 6 W. R. (V.-C. S.) 610.

A trust relating to lands must, under the 7th section of the Statute of Frauds, be manifested and proved by some writing (*Foster* v. *Hall*, 3 Ves. 696; *Smith* v. *Matthews*, 9 W. R. (L. J.) 644). But a declaration by parol of the trusts of personal property will be sufficient to create a trust. Thus in *M'Fadden* v. *Jenkyns*, 1 Ph. 153, A. had sent a verbal direction to B., who owed him 500*l.*, to hold the debt in trust for C., a volunteer; B. assented to and acted upon the direction, by paying C. 10*l.* as part of the trust money. Lord *Lyndhurst*, affirming the decision of Sir *J. Wigram*, V.-C. (reported 1 Hare, 458), held, that a *declaration by parol was sufficient* to create a trust of personal property, and that, as the debtor had assented to and acted upon the direction, a complete and irrevocable trust was impressed upon the money. And see *Peckham* v. *Taylor*, 31 Beav. 250; *Middleton* v. *Pollock*, 4 Ch. D. 49; *Makcown* v. *Ardagh*, 10 I. R. E. 445.

Where, however, there is a declaration of trust by parol, if the case be one of doubt or difficulty upon the words which have been supposed to have been used, the Court will give weight to the consideration that the words, not

being committed to writing in any definite and unquestionable form, may not be the deliberately expressed sentiments of the party: *Dipple* v. *Corles*, 11 Hare, 183; and see *Paterson* v. *Murphy*, Ib. 91, 92.

In the following cases it will be seen what will be considered, although not in terms, to be equivalent to a declaration of trust: *Frampton* v. *Frampton*, 4 Beav. 287; *James* v. *Bydder*, 4 Beav. 605; *Thorpe* v. *Owen*, 5 Beav. 224; *Stapleton* v. *Stapleton*, 14 Sim. 186; *Wilcocks* v. *Hannyngton*, 5 Ir. Ch. Rep. 38; *Donaldson* v. *Donaldson*, Kay, 711, 717; *Woodroffe* v. *Johnston*, 4 Ir. Ch. Rep. 319; *Gray* v. *Gray*, 2 Sim. N. S. 273; *Ouseley* v. *Anstruther*, 10 Beav. 461; *Moore* v. *Darton*, 4 De G. & Sm. 517; *Paterson* v. *Murphy*, 11 Hare, 88; *Lloyd* v. *Chune*, 2 Giff. 441; *Steele* v. *Waller*, 28 Beav. 466; *Maguire* v. *Dodd*, 9 Ir. Ch. Rep. 452; *Arthur* v. *Clarkson*, 35 Beav. 458; *Gee* v. *Liddell*, Ib. 621; *Miller* v. *Harrison*, 5 I. R. Eq. 324; and see the remarks of Sir John *Romilly*, M. R., in *Price* v. *Price*, 14 Beav. 602.

The dictum attributed to Lord *Cranworth*, C., in *Scales* v. *Maude*, 6 De Gex, Mac. & G. 51, to the effect that a mere declaration of trust by the owner of property in favour of a volunteer is inoperative, and that the Court of Chancery will not interfere in such a case, seems to be unsupported by the authorities, and is admitted by his Lordship in *Jones* v. *Lock*, 1 Law Rep. Ch. Ap. 28, to be "clearly wrong as a general statement of the law."

The consent of a married woman, given before commissioners, for the transfer and payment to her husband of sums of stock and cash standing in Court to her separate account has been held not to amount to a declaration of trust, and that it was competent to her, at any time before the transfer had been completed, to retract her consent: *Penfold* v. *Mould*, 4 L. R. Eq. 562.

A mere expression of an intention to divide property with, or to leave it to, others will not, it seems, be held to amount to a declaration of trust, and, like a mere promise to give, will not be enforced in equity: *Dipple* v. *Corles*, 11 Hare, 183; *Re Glover*, 2 J. & H. 186; and see *In re Mills's Estate*, 7 W. R. (V.-C. K.) 372; *Forbes* v. *Forbes*, 6 W. R. (V.-C. W.) 92; *Jones* v. *Lock*, 1 L. R. Ch. App. 25; *Lister* v. *Hodgson*, 4 L. R. Eq. 30.

Where a paper is of a testamentary character, but invalid from want of proper execution, it cannot be enlarged or converted into a declaration of trust: *Warriner* v. *Rogers*, 16 L. R. Eq. 340, 353; *Milroy* v. *Lord*, 4 De G. F. & J. 274.

A declaration of trust by the equitable owner of a chose in action vested in trustees will be supported. Thus, in *Collinson* v.

Patrick, 2 Kee. 123, a bond, and all sums of money recoverable in respect thereof, had been assigned to trustees, in trust for such intents and purposes, and such person or persons, as E. P., a married woman, should direct or appoint; and, in default of appointment, for her separate use. E. P. afterwards appointed her interest in the bond to certain persons, in order to indemnify them, in case they should not be able to recover the whole of a sum appropriated by her husband, who was their solicitor, and for no other consideration appearing upon the deed. It was objected, that the deed being voluntary, and something requiring to be done by the party creating the trust, it was a trust which could not be executed by the Court. However, Lord *Langdale*, M. R., held, that a binding trust had been created. "It seems to me," said his Lordship, "that, so far as depended upon the party executing this deed, everything has been done to constitute an executed trust. It is certainly a matter well worthy of consideration how far the peculiar situation of a married woman, entering into such an engagement as the present, by which she binds her separate estate, is not entitled, in a court of equity, to the same species of protection which the law gives to persons entering into a legal obligation, and whether a contract of indemnity so entered into should not, in this court, be supported by a valuable consideration. A declaration of trust is considered, in a court of equity, as equivalent to a transfer of the legal interest in a court of law; and, if the transaction by which the trust is created is complete, it will not be disturbed for want of consideration. If this had been a transaction resting on an agreement not conferring the legal interest—if it had been an executory contract, this court, in the absence of consideration, would not have given effect to it; but, *if what has been done is equivalent to a transfer of the legal interest*, the parties in whose favour the trust is created are entitled to have the benefit of it in this court; and I am of opinion that this deed gives an interest to the plaintiffs which does so entitle them:" see also *Tierney* v. *Wood*, 19 Beav. 330.

Upon the same principle, if the equitable owner of property vested in trustees, as in *Ellison* v. *Ellison*, assigns it to them, or directs them to apply it upon trusts declared in favour of volunteers, and the trustees accept and act upon the trusts, they will be enforced in equity. In *Rycroft* v. *Christy*, 3 Beav. 238, Mrs. Rycroft, the cestui que trust of money in the hands of a trustee, by deed without consideration directed part of the dividends to be paid by him for the maintenance of an infant, a stranger to Mrs. Rycroft, and covenanted to indemnify the trustee, and agreed

to allow the same out of the dividends of the trust fund. The trustee accepted the new trust and acted upon the deed. Lord *Langdale*, M. R., held, that, as there was no further instrument or formality to be executed, from the moment when the direction was signed and accepted by the trustee a valid and executed trust was created, which Mrs. Ryecroft could not revoke. So, in *Meek* v. *Kettlewell*, 1 Hare, 471, Sir *James Wigram*, V.-C., observes, that, if the equitable owner of the property, the legal interest of which is in a trustee, should execute a voluntary assignment of the property, and authorise the assignee to sue for and recover the property from that trustee, and the assignee should give notice thereof to the trustee, and the trustee should accept the notice and act upon it, by paying the dividends or interest of the trust property to the assignee during the life of the assignor, and with his consent, it might be difficult for the executor or administrator of the assignor afterwards to contend that the gift of the property was not perfect in equity. See also *M'Fadden* v. *Jenkins*, 1 Hare, 458; 1 Ph. 153; *Bentley* v. *Mackay*, 15 Beav. 12; *Bridge* v. *Bridge*, 16 Beav. 322; *Donaldson* v. *Donaldson*, Kay, 711; *Gilbert* v. *Overton*, 2 Hem. & Mill. 110; *Lambe* v. *Orton*, 1 Dr. & Sm. 125.

It does not, however, seem now to be considered essential to the validity of the creation of a trust by the beneficial owner of property, that there should be an acceptance or declaration of the trusts by the trustees in whom the legal interest is vested. Thus, in *Tierney* v. *Wood*, 19 Beav. 330, where land and stock were vested in the plaintiff Tierney, in trust for Wood, the latter signed a document addressed to Tierney, directing that the land and stock should after his death be held for the benefit of certain persons. The document was not attested. It was held by Sir *J. Romilly*, M. R., that an effectual trust within the meaning of the Statute of Frauds had been declared by the beneficial owner, and that the document was not testamentary. "The authorities," said his Honor, "show that the proper person to create the trust in personal property, is the person in whom the beneficial interest of the property is vested; and the trust being created by the beneficial owner, the trustee is bound, and if disposed to refuse may be compelled to obey it. I am at a loss to find any reason which should cause this document to be effectual as a declaration of trust, so far as the stock is concerned, and not so, so far as the land is concerned. It is obvious, that in both cases the person enabled by law to declare the trusts is the same. In the case before me, there can be no doubt that if Mr. Tierney had, in pursuance of this

paper, signed a document to the same effect, stating that he held the property on the trusts therein mentioned, the trusts would, apart from any question on the construction of the document, have been fully and completely declared; and it is also clear, that if the trustee had declared that he held the property on any trusts not recognised or sanctioned by Wood, the beneficial owner, such declaration of trust would have been insufficient and unavailing, and would have given no interest to the supposed cestui que trust. A declaration of trust in writing, by Tierney, following that of Wood, would therefore have been merely formal, and would have been valid only so far as it followed his instructions, and would have been void to the extent, if any, that it departed from his directions. I think that the fair conclusion to be drawn from these considerations is, that the person to create the trust, and the person who is by law enabled to declare the trust, are one and the same, and that, consequently, the beneficial owner is the person, by law, enabled to declare the trust." See also *Donohoe* v. *Conraby*, 2 Jo. & L. 689.

Nor is notice of the declaration of trust to the cestui que trust necessary: *Tate* v. *Leithead*, Kay, 658.

And as between volunteers, notice to the debtor of an assignment of a debt, will not affect priorities. *Justice* v. *Wynne*, 12 I. Ch. R. 289. But subsequent assignees for value will gain priority, by giving notice before the first assignee, even although he were assignee for valuable consideration. See note to *Ryall* v. *Rowles*, vol. ii. L. C. Eq.

Although a man at law cannot make a gift of chattels to his wife, he may do so in equity, not only by the intervention of another person as trustee, but also by constituting himself a trustee for his wife: (*Lucas* v. *Lucas*, 1 Atk. 271; *M'Lean* v. *Longlands*, 5 Ves. 79; *Walter* v. *Hodge*, 2 Swanst. 107). There must, however, be clear and distinct evidence corroborative of the wife's testimony, in order to establish a gift from her husband: (*Grant* v. *Grant*, 34 Beav. 623), but a mere declaration of intention to give will not be sufficient: *Ib.* It seems, however, that presents made by a husband to his wife, whether in contemplation of, or subsequent to their marriage, are the separate property of the wife, and do not form part of the husband's personal estate: *Ib.*

If a testator *by will* gives personal property upon trusts to be afterwards declared, he cannot, either by any instrument not duly executed as a will or codicil, or by parol, make any valid declaration of trust; and the property will go either to the next of kin or the residuary legatees: *Johnson* v. *Ball*, 5 De G. & Sm. 85.

We must, always, carefully distinguish that class of cases in which the settlor constitutes himself a trustee for volunteers, from another class of cases in which a person has ineffectually attempted, by an imperfect gift, to confer the whole interest upon volunteers or trustees for their benefit; for it has been repeatedly determined, that the most clear intention to confer an interest will not be sufficient to create a trust in favour of a volunteer. The leading case on this point is *Antrobus* v. *Smith*, 12 Ves. 39. There Gibbs Crawford made the following indorsement upon a receipt for one of the subscriptions in the Forth and Clyde Navigation: "I do hereby assign to my daughter, Anna Crawford, all my right, title, and interest of and in the enclosed call, and all other calls, of my subscription in the Clyde and Forth Navigation." This not being a legal assignment, Sir *S. Romilly* argued, "that the father meant to make himself a trustee for his daughter of these shares." But Sir *W. Grant*, M. R., observed "Mr. Crawford was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee; nor was that mode of doing what he proposed in his contemplation. He meant a gift. He says, he assigns the property. But it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case, in which a party has been compelled to perfect a gift, which, in the mode of making it, he has left imperfect. There is locus pœnitentiæ as long as it is incomplete." So, in *Edwards* v. *Jones*, 1 My. & Cr. 226, where the obligee of a bond signed a memorandum, not under seal, which was indorsed upon the bond, and which purported to be an assignment of the bond, without consideration, to the person to whom the bond was at the same time delivered, Lord *Cottenham*, upon the authority of the doctrine laid down in *Antrobus* v. *Smith*, which he said it was impossible to question, held, that the gift was incomplete, and that, as it was without consideration, the Court could not give effect to it. So, also, in *Dillon* v. *Coppin*, 4 My. & Cr. 647, a voluntary assignment of East India Stock and shares in the Globe Insurance Company, by a deed poll, incapable of passing such property, was held, by Lord *Cottenham*, not to affect the settlor's interest in the East India Stock and the Globe shares. In *Searle* v. *Law*, 15 Sim. 95, A. made a voluntary assignment of turnpike road bonds and shares in an insurance and in a banking company to B., in trust for himself for life, and after his death for his nephew. He delivered the

bonds and shares to B., but did not observe the formalities required by the Turnpike Act, and the deeds by which the companies were formed, to make the assignment effectual. Sir *L. Shadwell*, V.-C., held, that on A.'s death no interest in either the bonds or the shares passed by the assignment, and that B. ought to deliver them to the executor of A. "If that gentleman," observed his Honor, "had not attempted to make an assignment of either the bonds or the shares, but had simply declared, in writing, that he would hold them upon the same trusts as are expressed in the deed, that declaration would have been binding upon him; and whatever bound him, would have bound his personal representative. But it is evident that he had no intention whatever of being himself a trustee for any one, and that he meant all the persons named in the deed as cestuis que trustent to take the provisions intended for them through the operation of that deed. He omitted, however, to take the proper steps to make that deed an effectual assignment; and, therefore, both the legal and the beneficial interest in the bonds and shares vested in him at his death." In *Woodford* v. *Charnley*, 28 Beav. 96, Alice Fisher was mortgagee in fee of land conveyed to her to secure 5000*l.* and interest, but the mortgage deed contained no covenant for payment of the 5000*l.* The mortgagor died intestate. Alice Fisher afterwards executed a voluntary settlement by which she assigned the sum of 5000*l.* to trustees, and gave them a power of attorney to recover it. *The legal estate was never conveyed by Alice Fisher to the trustees.* It was held by Sir *John Romilly*, M. R., that the voluntary settlement was incomplete and could not be enforced against the settlor or any person claiming under her. See also *Coningham* v. *Plunkett*, 2 Y. & C. C. C. 245; *Price* v. *Price*, 14 Beav. 598; *Scales* v. *Maude*, 6 De Gex, Mac. & G. 43; *Weale* v. *Olive*, 17 Beav. 252; *Peckham* v. *Taylor*, 31 Beav. 250; *Lambert* v. *Overton*, 13 W. R. (V.-C. S.) 227.

In some recent cases, there appears to have been an inclination on the part of some judges, to hold that to amount to a declaration of trust, which, according to the ordinary rules of construction would amount only to an imperfect assignment: see *Richardson* v. *Richardson*, 3 L. R. Eq. 686; *Morgan* v. *Malleson*, 10 L. R. Eq. 475. The recent decision, however, of Sir *G. Jessel*, M. R., in *Richards* v. *Delbridge*, 18 L. R. Eq. 11, has put the law upon this subject on a very satisfactory footing. In that case, J. Delbridge, who was possessed of leasehold business premises and stock in trade, shortly before his death purported to make a voluntary gift in favour of his grandson E. B. Richards, who was an in-

fant, and assisted him in his business, by the following memorandum, signed and indorsed on the lease: "This deed, and all thereto belonging, I give to E. B. Richards from this time forth, with all the stock in trade," signed, "J. Delbridge." J. Delbridge delivered the lease to the mother of his grandson. It was held by Sir *G. Jessel*, M.R., that there was no valid declaration of trust of the property in favour of E. B. Richards. "This bill," said his Honor, "is warranted by the decisions in *Richardson* v. *Richardson* (3 L. R. Eq. 686) and *Morgan* v. *Malleson* (10 L. R. Eq. 475); but on the other hand, we have the case of *Milroy* v. *Lord* (4 De G. F. & J. 264), before the Court of Appeal, and the more recent case of *Warriner* v. *Rogers* (16 L. R. Eq. 340, 348), in which the Vice-Chancellor *Bacon* said: 'The rule of law upon this subject I take to be very clear, and with the exception of two cases, which have been referred to (*Richardson* v. *Richardson* and *Morgan* v. *Malleson*), the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take it to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest.'

"The two first mentioned cases are wholly opposed to the two last. That being so, I am not at liberty to decide the case otherwise than in accordance with the decision of the Court of Appeal. It is true the judges appear to have taken different views of the construction of certain expressions, but I am not bound by another judge's view of the construction of particular words; and there is no case in which a different principle is stated from that laid down by the Court of Appeal. Moreover, if it were my duty to decide the matter for the first time, I should lay down the law in the same way.

"The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property, takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the

property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. *It is true he need not use the words 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning;* for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning.

"The cases in which the question has arisen are nearly all cases in which a man, by documents insufficient to pass a legal interest, has said, 'I give or grant certain property to A. B.' Thus in *Morgan* v. *Malleson* (10 L. R. Eq. 475), the words were, 'I hereby give and make over to Dr. Morris an India bond,' and in *Richardson* v. *Richardson*, the words were, 'grant, convey, and assign.' In both cases the judges held that the words were effectual declarations of trust. In the former case, Lord *Romilly* considered that the words were the same as these: 'I undertake to hold the bond for you,' which would undoubtedly have amounted to a declaration of trust.

"The true distinction appears to me to be plain, and beyond dispute: for a man, to make himself a trustee, there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not to retain it in the donor's own hands for any purpose, fiduciary or otherwise. In *Milroy* v. *Lord* (4 De G. F. & J. 264, 274), Lord Justice *Turner*, after referring to the two modes of making a voluntary settlement valid and effectual, adds these words: 'The cases, I think, go further, to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.'

"It appears to me that that sentence contains the whole law on the subject. If the decisions of Lord *Romilly* and Vice-Chancellor *Wood* were right, there never could be a case where an expression of a present gift would not amount to an effectual declaration of trust, which would be carrying the doctrine on that subject too far. It appears to me that these cases of voluntary gifts should not be confounded with another class of cases, in which words of present transfer *for valuable consideration* are held to be evidence of a contract which the Court will enforce. Applying that reasoning

to cases of this kind, you only make the imperfect instrument evidence of a contract of a voluntary nature, which this Court will not enforce; so that, following out the principle even of those cases, you come to the same conclusion." See also *Moore* v. *Moore*, 18 L. R. Eq. 474, 482; *Heartley* v. *Nicholson*, 19 L. R. Eq. 233.

However, assignments both of equitable and legal choses in action, although nothing passes thereby at law, have been held binding in favour of volunteers, where the assignor has done all in his power to make the assignment complete. Thus, in *Sloane* v. *Cadogan*, Sugd. V. and P., App. No. xxiv., 11th ed., Mr. W. Cadogan, having an equitable reversionary interest in a fund vested in trustees, assigned it to other trustees upon trust for volunteers. It was contended by Sir *Edward Sugden*, in his argument, that, in order to constitute an actual settlement, so as to enable a volunteer to claim the benefit of it, it is absolutely necessary that the relation of trustee and cestui que trust should be established; that Mr. W. Cadogan did all he could; but that is not enough: that he could not make an actual transfer; that the trustees in whom it was vested would not have been authorised in transferring it of their own authority to the trustees of Mr. W. Cadogan's settlement. "If," he says, "a man is seised of the legal estate, and agree to make a voluntary settlement, it cannot be enforced. Can it make any difference that the legal estate happens to be outstanding? Certainly not. As the settlement, therefore, was not completely perfected, the Earl could not enforce it." Sir *W. Grant*, M. R., however, held, that the equitable assignment created a perfect trust. "The Court," observed his Honor, "will not interfere to give perfection to the instrument, but you may constitute one a trustee for a volunteer. Here *the fund was vested in trustees:* Mr. W. Cadogan had an equitable reversionary interest in that fund, and he assigned it to certain trustees, and then the first trustees are trustees for his assigns, and they may come here; for when the trust is created, no consideration is essential, and the Court will execute it though voluntary."

In *Fortescue* v. *Barnett*, 3 My. & K. 36, J. B. made a voluntary assignment by deed of a policy of assurance effected upon his own life and in his own name for 1000*l.*, to trustees, upon trust for the benefit of his sister and her children. The deed was delivered to one of the trustees, and the grantor kept the policy in his own possession. *No notice of the assignment was given to the assurance office*, and J. B. afterwards surrendered, for a valuable consideration, the policy and a bonus declared upon it to the assurance

office. A bill was filed by the surviving trustee of the deed against J. B. to have the value of the policy replaced. It was argued by Mr. *Pemberton*, for the defendant, upon the distinction laid down by Lord *Eldon* in the principal case, between an actual transfer and a mere covenant to transfer stock, that the assignment of stock by deed, no actual transfer of the stock having been made, and an assignment of a policy of assurance by deed, the policy remaining in the hands of the grantor, stood upon exactly the same footing. But Sir *J. Leach*, M. R., held, that J. B. was bound to give security to the amount of the value of the policy assigned by the deed. "In the case," observed his Honor, "of a voluntary assignment of a bond, where the bond is not delivered, but kept in the possession of the assignor, the Court would undoubtedly, in the administration of the assets of the assignor, consider the bond as a debt to the assignee. There is a plain distinction between an assignment of stock, where the stock has not been transferred, and an assignment of a bond. In the former case, the material act remains to be done by the grantor, and nothing is in fact done which will entitle the assignee to the aid of this Court until the stock is transferred; whereas the Court will admit the assignee of a bond as a creditor.

"In the present case, the gift of the policy appears to me to have been perfectly complete without delivery. Nothing remained to be done by the grantor; nor could he have done what he afterwards did to defeat his own grant, if the trustees had given notice of the assignment to the assurance office. The question here does not turn upon any distinction between a legal and an equitable title, *but simply upon whether any act remained to be done by the grantor, which, to assist a volunteer, this Court would not compel him to do.* I am of opinion, that no act remained to be done to complete the title of the trustees. The trustees ought to have given notice of the assignment; but their omission to give notice cannot affect the cestui que trust." See, also, *Godsal* v. *Webb*, 2 Kee. 99; *Pearson* v. *The Amicable Assurance Office*, 27 Beav. 229; *Pedder* v. *Moseley*, 31 Beav. 159.

Lord *Cottenham*, in *Edwards* v. *Jones*, 1 My. & C. 238, in commenting upon *Sloane* v. *Cadogan*, and *Fortescue* v. *Barnett*, observes, "that in neither of them was any intention expressed by the learned judge to depart from the established rule, but that, in both, the decision turned upon the question of fact, whether or not the relation of trustee and cestui que trust was actually constituted. In neither was it attempted to make an imperfect a perfect gift. In *Sloane* v. *Cadogan*, the *claim was not*

against the donor or his representatives, for the purpose of making that complete which had been left imperfect, but against the persons who had the legal custody of the fund; and the question was, whether the transaction constituted them trustees of the fund for the cestui que trusts. Sir *W. Grant* came to the conclusion that it did, and the consequence was that they were bound to account. That case has been considered by Sir *Edward Sugden* as going a great way; but upon the principle stated by Sir *W. Grant*, it is free from all possible question, for there was no attempt in that case to call in aid the jurisdiction of this Court.

"*Fortescue* v. *Barnett* falls precisely within the same observation, although there are some expressions in it, especially where the learned judge speaks of a bond which has been voluntarily assigned being considered a debt to the assignee, which probably were not intended to convey the meaning they do . . . . . There a party had insured a life, and the contract of the office was to pay to the party insuring, his executors, administrators, and assigns, but the practice of the office was stated to be, that, upon an assignment, the office recognised the assignee; and the policy was, therefore, an assignable instrument. The policy *was not assignable at law, but it was a title which, by contract, was assignable as between the parties;* and the party in that case assigned, but the assignee did not give notice to the office, and consequently, the original insurer dealt with the office, received a bonus, and then surrendered the policy. The Master of the Rolls in that case considered, as he naturally would, whether this transaction was not a gift—whether it did not, in fact, confer a title on the assignee; and if it did, then, consistently with all the authorities, he considered that he was bound to give the assignment its full effect; and he put his decision expressly upon the fact, that the transaction was complete; that there was nothing further for the donor or the donee to do; that the latter had nothing to ask further from the donor." His Lordship then adds, "Whether, upon the circumstances of that case, it was right or wrong to come to that conclusion, is a question with which I have nothing to do. The principle of the decision is quite consistent with the other cases; for it proceeds upon the same ground, namely, that, if the transaction is complete, the Court will give it effect."

Upon the authority of *Sloane* v. *Cadogan* and *Fortescue* v. *Barnett*, it has been held, that the assignment of a debt to a volunteer was binding, although nothing passed at law. Thus in *Blakely* v. *Brady*, 2 Dru. & Walsh, 311, A. made a voluntary assignment to B. of a

note or memorandum in writing, being the acknowledgment of a sum of 1,620*l.* then due to him from K., and all interest then due, or which might thereafter accrue due on the foot thereof, upon trust to pay the interest thereof unto A., his executors, administrators, and assigns, for his life, and a period of fourteen months afterwards, and, at the expiration of the said fourteen months to pay out of the principal some small sums to and amongst certain persons and relations in the deed particularly mentioned; and as to the residue, in trust for B., his executors, administrators, and assigns, for his and their own benefit. The deed also contained a provision, whereby B., his executors, administrators, and assigns, were irrevocably appointed the attorneys of the said A., for the purpose of suing for and recovering the said debts. A. soon afterwards died, without having made any will or other disposition of the property. The administrator of A. refused to allow his name to be used to enable B. to recover the said sum, having actually himself commenced an action for that purpose. Upon a bill filed by B. to restrain proceedings in the action, and to carry the trusts of the deed into execution, it was held by Lord *Plunket*, that, as the transaction between A. and B. was complete, the deed, though voluntary, should be carried into execution. "In this case," observed his Lordship, "as between the assignor and assignees, the gift is absolute; and the difference between the cases where something remains to be done, and those in which nothing remains to be done, is so fully established by the authorities which have been cited on both sides in the argument, that it is unnecessary for me to enter into any enumeration of them. The case of *Fortescue* v. *Barnett*, besides recognising the general distinction which I have just adverted to, bears directly on the present point. There the assignment of a policy of insurance was held valid and complete, though the instrument itself was never delivered.

"It is said, but in my opinion, most erroneously, that the authority of that case is shaken by the case of *Jones* v. *Edwards*, before the present Lord Chancellor of England. It seems to me, that he expressly recognises its authority and on this principle, that, if the transaction is complete, the Court will give it effect. It is true, Lord *Cottenham* says, that the observation of Sir *J. Leach*, in *Fortescue* v. *Barnett*, 'that a bond voluntarily assigned was considered as a debt to the assignee,' was probably not intended to convey the meaning the words might bear; but this observation of Lord *Cottenham* must, in my opinion, be merely understood as a guard against the supposition,

that the mere assignment of a bond, unaccompanied by delivery, or by any other circumstances, would be considered as a debt to the assignee. In the case before Lord *Cottenham* there was no assignment, but a mere memorandum entered on a bond attached to another bond, which clearly was never intended to be given to the plaintiff; and he there dismissed the bill, on the ground of the transaction not being complete, and that a further act remained to be done by the donor.

"The case of *Uniacke* v. *Giles*, 2 Moll. 257, does not resemble this. There the person entitled to a chose in action executed an assignment of it to the defendant in trust for the plaintiff, and did not deliver the deed, but kept it in her possession until her death; and it was held, that the retention of the deed in the custody of the donor made it revocable, and that it had been revoked.

"The decision in *Antrobus* v. *Smith* cannot be drawn in aid of the defendant's case. There the conveyance was imperfect, never delivered: it was simply an indorsement on a receipt for subscription, and found among the papers of the executrix.

"The present case differs from all these. The assignment as between the donor and donee is perfect; and the only objection is, that the chose in action is not legally assignable. Besides, it is admitted that the original security was, at some time during the life of the assignor, delivered to the assignee; and, in addition to this, the assignment contains a full power of attorney to the assignee, which alone, in my opinion, ought to govern the case.

"It is asked, why does the plaintiff come into this Court, if the assignment is imperfect? The answer is obvious: he comes here because the property is in the defendant, to whom the ecclesiastical court has granted administration, and he is an administrator in trust. Now you may constitute a trustee for a volunteer; and the case of *Sloane* v. *Cadogan* is directly in point as to that. The only difference is, that, in the present case, the law has created the trust; and in *Sloane* v. *Cadogan* the trust was created by the act of the donor. See also *Parnell* v. *Hingston*, 3 Sm. & G. 337; *Gannon* v. *White*, 2 Ir. Eq. Rep. 207; *Roberts* v. *Lloyd*, 2 Beav. 376; sed vide *Sewell* v. *Morsy*, 2 Sim. N. S. 189."

The remarks however of Lord *Langdale* in *Ward* v. *Audland*, 8 Beav. 201, seem to be scarcely consistent with the cases of *Sloane* v. *Cadogan*, *Fortescue* v. *Barnett*, and *Blakely* v. *Brady*, for there his Lordship appears to be of opinion that the mere voluntary assignment of a chose in action is not binding upon the ground that nothing thereby passes at

law, and the transaction is, therefore, incomplete. This also seems to have been the opinion of Sir *L. Shadwell*, V.-C., in *Beatson* v. *Beatson*, 12 Sim. 291.

In *Ward* v. *Audland*, 8 Beav. 201, W. W., who was possessed of and entitled to certain household goods and effects, a sum of 546*l*. 2*s*. 6*d*. (the payment of which was secured by a mortgage in fee of certain customary lands), and a policy of assurance for the sum of 1000*l*. payable after his death, by a voluntary deed assigned to the plaintiff all his household goods, and all sums of money then owing to him, with all policies of assurance and other securities for the same, and all other his personal estate, together with the mortgage deeds and writings relating to the premises, upon trust for W. W., for life, and, after his death, for others; and he gave the plaintiff a power of attorney to get in any sum of money secured on mortgage; and he also covenanted for further assurance. On the execution of the deed by W. W., it was delivered to the plaintiff; but W. W. continued in possession of the furniture thereby assigned, and in receipt of the income arising from the mortgage, and no notice of the assignment was given, either to the mortgagor or to the grantors of the policy of assurance. Lord *Langdale*, M. R., said: "Supposing the assignment to have been a complete and effectual assignment, there is not only no conflict, but no question nor any difficulty as to the trusts which the plaintiff had to perform. If the property was *legally* vested in the plaintiff, he might have recovered it at law, and applied it on the trusts; if the property was not *legally and effectually* vested in the plaintiff, then, as the deed was voluntary, this Court could afford no assistance to the plaintiff in recovering it; and, under these circumstances, the only question between the parties is, what is the *legal* effect of the assignment? . . . . . The debt and policy of assurance are choses in action *not assignable at law*, and it is plain that the whole estate and interest of the assignor did not and could not pass to an assignee; and I apprehend, that, in the case of a voluntary deed, neither the assignor nor his executor could have been compelled to permit the assignee to use his name for the recovery of the debt. The assignment was deficient, because it did not vest in the assignee all that the assignor professed and intended to pass; and no instance, except the case of *Fortescue* v. *Barnett*, has been produced, in which this Court has given effect to such an assignment. It does not appear by the report what were the grounds on which Lord *Cottenham*, in deciding the case of *Edwards* v. *Jones*, gave the interpretation he did to *Fortescue* v. *Barnett*; but it is certainly clear, that Sir *John Leach*

did not in that case intend to alter the rule of the Court which was previously established; and it is also clear that the circumstances, by which Lord *Cottenham* seemed to think *Fortescue* v. *Barnett* might be explained, are not found in the present case. It appears to me, that neither a voluntary assignment by deed of a mortgage debt, accompanied by a grant, not specifying the particular estate, but of all estates held in mortgage, and by a covenant for further assurance, without delivery of the mortgage deed or notice to the mortgagor, nor the voluntary assignment of a policy of assurance retained in the hands of the assignor, and without notice given to the grantor though accompanied by a covenant for further assurance, can be considered as a complete and effectual assignment, to be acted upon and enforced by the assignee, without any further or other act to be done by the assignor. With respect to the furniture, the bill claims the legal right to it for the plaintiff; and if he had it, I am of opinion that he ought to have proceeded at law to recover it. With respect to the mortgage, the bill alleges the legal estate to be in the defendants, or some of them, and prays for a conveyance in aid of the voluntary gift. On the whole, I think that the plaintiff is not entitled to any relief, and that the bill must be dismissed but without costs."

Sir *J. Wigram*, V.-C., also (1 Hare, 474), was clearly of opinion, that an assignment under seal of that which did not pass at law by the operation of the assignment itself, unaccompanied by other acts, was no better than a covenant or agreement to assign: see *Meek* v. *Kettlewell*, 1 Hare, 464. There M., who, in the event of surviving her daughter, and of the death of her daughter without issue, would, as next of kin, be entitled to a fund which was vested in trustees, executed a voluntary assignment of her interest in the fund to the husband of the daughter, and declared the trusts of the assignment as to part for the benefit of M. herself, and as to another part for the daughter's husband absolutely. No notice of the assignment was given to the trustees. The daughter afterwards died without issue, and the husband filed his bill against the trustees and M., to compel the performance of the trust. Sir *J. Wigram* was of opinion, upon the authority of the cases of *Colman* v. *Sarrel*, 3 Bro. C. C. 12, and *Holloway* v. *Headington*, 8 Sim. 324, that an assignment under seal of that which did not pass at law by the operation of the assignment itself, stood upon no better ground than a covenant or agreement to assign: and that a voluntary assignment, unaccompanied by any other acts, was not to be regarded as effectual to pass an equitable interest. His Honor

therefore held, that the voluntary assignment did not create a trust which equity would enforce; observing, however, that he decided only that a voluntary assignment of a mere expectancy, not communicated to those in whom the legal interest was, did not create a trust in equity, within the principle of the cases relied upon by the plaintiff. This decision, on appeal, was affirmed by Lord *Lyndhurst:* 1 Ph. 342. See also *Beatson* v. *Beatson,* 12 Sim. 281; *Ward* v. *Audland,* 8 Sim. 571; *S. C.,* C. P., Coop. Rep. 146; 8 Beav. 201.

The leading case, however, of *Kekewich* v. *Manning* (1 De Gex, Mac. & G. 176) must be considered in effect, though perhaps not expressly, as overruling *Holloway* v. *Headington* (8 Sim. 324), *Ward* v. *Audland* (8 Beav. 201); *S. C.,* C. P. Coop. Rep. 146; 8 Beav. 201, and even *Meek* v. *Kettlewell,* unless that case can be supported upon the ground that it was the assignment of a mere expectancy. The case of *Kekewich* v. *Manning* (1 De Gex, Mac. & G. 176) is as follows: A lady entitled absolutely to the reversion in stock, *subject to the life interest of her mother* therein, and which stock was standing in the joint names of herself and her mother, assigned her interest in this stock on her marriage, to trustees in trust for herself for life, remainder to her husband for life, and after their decease, in trust for a niece, and for the issue of the marriage and the issue of the niece according to appointment; and in default of issue of the marriage, in trust for the niece of the settlor. No transfer of the fund took place, but the mother had notice of the settlement. There was no issue of the marriage. It was held by the Lords Justices *Knight-Bruce* and Lord *Cranworth,* that even if the settlement were voluntary as regarded the niece and not supported by the marriage consideration (which point, however, the Court did not decide), the assignment being complete would be enforced by the Court. "Suppose," said Lord Justice *Knight-Bruce,* "stock or money to be legally vested in A. as trustee for B. for life; and subject to B.'s life interest, for C. absolutely; surely it must be competent to C. in B.'s lifetime, with or without the consent of A., to make an effectual gift of C.'s interest to D. by way of mere bounty, leaving the legal interest and legal title unchanged and untouched. Surely it would not be consistent with natural equity or with reason or expediency to hold the contrary, C. being sui juris, and acting freely, fairly, and with sufficient advice and knowledge. If so, can C. do this better or more effectually than by executing an assignment to D.? It may possibly be thought necessary to the complete validity of such a transaction, that notice

should be given to A.: upon that we do not express an opinion.

"Suppose the case only varied by the fact that A. and C. are the trustees jointly, instead of A. being so alone? Does that make any substantial difference as to C.'s power, the mode of making the gift, or the effect of the act, C. not severing nor affecting the legal joint tenancy? C. would necessarily have notice. Possibly it may be thought material that B. should have notice likewise, but upon that we avoid saying anything, beyond referring to *Meux* v. *Bell* (1 Hare, 73), and to *Smith* v. *Smith*, mentioned in *Meux* v. *Bell*." See also the elaborate judgment of Sir *J. Stuart*, V.-C., in *Voyle* v. *Hughes*, 2 Sm. & Giff. 18; *Re Way's Trusts*, 2 De G. Jo. & Sm. 365; *Richardson* v. *Richardson*, 3 L.R. Eq. 686.

It has, however, been held by Lord *Romilly*, M. R., that the transfer of an equitable estate in real property to volunteers was invalid. *Bridge* v. *Bridge*, 16 Beav. 315, 327, 328; but Lord *St. Leonards*, with reference to this decision, says, it "seems open to reconsideration." Sugd. V. & P. 719, 14th ed.; and see *Gilbert* v. *Overton*, 2 Hem. & Mill. 117: where Sir *W. Page Wood*, V.-C., observes, "I do not wish to say more as to *Bridge* v. *Bridge* than this: that the points there dealt with will require much consideration. A man who conveys his equitable interest may well be considered to do all that can be required, and it would be a great extension of the established doctrine on these subjects to hold that if a legal estate is discovered, perhaps many years afterwards, to have been outstanding at the date of a voluntary settlement, the settlement itself is to be deprived of effect. Where a settlor by a voluntary instrument conveys all his interest, it may well be held that if that interest proves to be merely equitable, the assignee becomes entitled to claim a conveyance of the legal estate from the person in whom it may be vested."

And it has been decided that it is not essential to the validity of an equitable voluntary assignment, at any rate where it has been acted upon by all parties, that it should be by deed. *Lambe* v. *Orton*, 1 Drew. & Sm. 202.

A distinction has been taken in recent cases by the Master of the Rolls to this effect, that although it is clear that an assignment by deed of reversionary personal property vested in trustees in favour of volunteers will be enforced in equity, yet, if, although property be vested in trustees, it is entirely in the power of the assignor, so that he could compel a transfer from them, should he neglect to do so, a mere assignment will, in the same manner as if the property had been legally vested in himself, be imperfect, that is to

say, not so complete as he could have made it, and will consequently not be enforced by a Court of equity. Thus in *Bridge* v. *Bridge*, 16 Beav. 315, where it appears that a sum of stock was standing in the name of four trustees of a will by the terms of which they were to apply the dividends for the benefit of the plaintiff until he was twenty-five, at which age it was to be paid over to him. On the 10th of February, 1846, the plaintiff attained his age of twenty-one. On the 9th of April, 1847, he executed a voluntary deed by which he directed (amongst other things), that the personal estate to which he was entitled under the will, should thenceforth be considered as vested in the plaintiff and two new trustees, upon certain trusts therein mentioned. The deed also contained a covenant for further assurance. No transfer of the stock was made to the new trustees. The plaintiff having filed a bill, seeking a declaration that the settlement of 1847 was not binding upon him, it was held by Sir *John Romilly*, M. R., that as there had been no legal transfer made, and no recognition of the trust by the original trustees, there was no complete trust constituted, and the plaintiff was therefore entitled to a transfer of the stock. "In my view of this particular case," said his Honor, "the question must be regarded in exactly the same manner, whether the plaintiff or a stranger had been the third trustee. This being so, there being four trustees of the will in whom the legal interest was vested, and the beneficial owner having assigned over the funds to these persons, in trust for certain persons as volunteers, no transfer is made to the new trustee so appointed, *nor is there any reason as in Kekewich* v. *Manning, why the transfer should not have been made.* In *Kekewich* v. *Manning*, the original trusts were not exhausted, but the life-estate of the mother continued in the stock, *and until her death no transfer could have been made. The assignor had done all she could do.* That is not so in this case. The trustees of the deed of settlement did not do anything inconsistent with the trusts which remained to be performed under the testator's will, and the trustees of the will seem not to have been advised to resist making any transfer to the trustees of the deed, until the settlor had attained his age of twenty-five years." So likewise in *Beech* v. *Keep*, 18 Beav. 285, A., subject to the life-interest of B., was absolutely entitled to a sum of stock, which was standing in the names of two deceased trustees, to the survivor of whom A. was sole executor. Under these circumstances, A. by deed voluntarily assigned all her interest in the stock to B., "to the intent that he might be and become present and absolute owner thereof." A having refused to execute a power of

attorney to B., for a transfer of the stock, it was held by Sir *John Romilly*, M. R., that A. could not be declared by the Court to be a trustee of the fund, nor compelled to transfer it. His Honor distinguishing the case from *Kekewich* v. *Manning* (1 De G. Mac. & G. 176), considered that it fell within the principle of his own decision in *Bridge* v. *Bridge*, 16 Beav. 315). "In the present instance," said his Honor, "It is obvious, there was no outstanding interest except the plaintiff's, and *the transfer of the stock ought to have been made, if both parties had been willing to complete the transaction, and if the transfer had been made, the plaintiff's title would have been complete.* The argument employed by the plaintiff, that having himself the life estate, no transfer could be made without his consent, clearly does not apply, because he would be the absolute owner if this assignment was perfect, and it was throughout his express desire to get the transfer completed. The transfer of the stock is, in fact, what the defendant has refused to make, and it is that transfer which the plaintiff has all along been trying to get, and which is now asked, to make the transaction complete."

Notice of the voluntary assignment of an equitable interest or of a chose in action, to the trustees or debtor, according to the recent authorities, is not essential to its validity, but if the trustees or debtor, before notice of the deed, transferred the property or paid the debt, the donee would have no remedy against them. Thus in *Donaldson* v. *Donaldson*, Kay, 711, the settlor having assigned stock standing in the names of trustees, to other trustees in favour of volunteers, it was held by Sir *W. Page Wood*, V.-C., that as between the donees under the assignment, and the representatives of the assignor, the title of the former was complete, although no notice of the assignment had been given to the trustees in whose names the stock was standing. "The question," said his Honor, "is, whether, notice not having been given to the trustee, the gift could be enforced. As to that, it has been said in some cases that the gift is complete when no further act is required to be done by the donor or donee: and that seems to imply a doubt, whether, if there were any act to be done by the donee, the gift could be treated as complete. But the assignment has completely passed the interest of the donor. It is true, that, if no notice of it were given to the trustees, they would be justified in transferring the stock to the original cestui que trust for whom they held it; and if they did so, there would be no remedy against them; and it is possible that the donee might not be able to recover the stock; but all that the donee has to do is, at any time he

thinks fit, to give notice to the trustees before the stock is transferred; and when he has given such notice his title is complete: and unless the donor or his executors actually obtain possession of the fund, the donee does not require the aid of the Court against them." See *Roberts* v. *Lloyd*, 2 Beav. 376; *Re Way's Trusts*, 2 De G. Jo. & Sm. 365.

The legislature has recently made policies of life assurance (30 & 31 Vict. c. 144), policies of marine insurance (31 & 32 Vict. c. 86), and the choses in action of bankrupts (32 & 33 Vict. c. 71, s. 22), assignable at law. See note to *Ryall* v. *Rowles*, vol. ii., where these acts are set out.

By the Judicature Act, 1873, (36 & 37 Vict. c. 66), any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor." Sect. 25, sub-sect. 6. See Trower's Prevalence of Equity, p. 45.

Although a conveyance in favour of a volunteer be complete, if it were executed under the influence of mistake (*Manning* v. *Gill*, 13 L. R. Eq. 485), or fraud (*Chesterfield* v. *Janssen*, post and note: *Huguenin* v. *Baseley*, vol. 2, post and note), it will not be carried into effect by a Court of equity, but will ordinarily be rescinded.

The Courts of equity, as is laid down in the principal case, will not carry into effect a mere voluntary agreement, contract, or covenant to transfer property (*Cotteen* v. *Missing*, 1 Madd. 176; *Colyear* v. *Mulgrave*, 2 Kee. 81; *Jeffreys* v. *Jeffreys*, Cr. & Ph. 138; *Dening* v. *Ware*, 22 Beav. 184; *Cheale* v. *Kenwood*, 6 W. R., M. R., 494; *Tatham* v. *Vernon*, 29 Beav. 604); or to forgive a debt, (*Strong* v. *Bird*, 18 L. R. Eq. 315.) In *Coningham* v. *Plunkett*, 2 Y. & C. C. C. 245, a person who was entitled to stock, standing in the names of two trustees, gave instructions to his attorney to prepare a settlement of it for the benefit of A., B., and C., and to procure from the trustees a transfer for the purposes of settlement. The settlement was prepared and a power of attorney for the transfer of the stock executed by both the trustees; but the intended settlor died with-

out having seen the settlement, and before the stock was actually transferred. Sir *J. L. Knight Bruce*, V.-C., held, that no trust of the stock was constituted for A., B., and C. In *Marler* v. *Tommas*, 17 L. R. Eq. 8, a trustee executed a settlement declaring the trusts of a sum of 2000*l.*, which was recited to have been paid to him by the settlor—a married woman. The recital as to the payment of the 2000*l.* was untrue, and the trustee executed the deed upon the faith of a promise that the settlor would pay him the 2000*l.* out of her separate estate. The 2000*l.* was never paid. It was held by Sir *G. Jessel*, M. R., that neither the trustee of the settlement, nor a volunteer under it could enforce the promise. "It is said," observed his Honor, "that the lady promised the trustee to pay him the 2000*l.* out of her separate estate, and the question is, can a bare volunteer enforce this voluntary promise against the assets of the person who made the promise? I am of opinion that there is no rule of equity which enables a volunteer to do this." See also *Pownall* v. *Anderson*, 2 Jur. N. S. 857.

Where, however, a person entered into a voluntary covenant to surrender copyholds, and in the meanwhile to stand possessed of them for trustees for the volunteers, though the covenant to surrender *per se* cannot be enforced, yet a valid trust is constituted for the volunteers. *Steel* v. *Waller*, 28 Beav. 466.

A merely meritorious consideration, as a provision for a wife or children, after marriage, will not be a sufficient inducement for a Court of equity to lend its aid in enforcing a voluntary agreement or covenant, or in giving effect to an imperfect gift. It might, perhaps, be inferred, from an expression of Lord *Eldon's*, in the principal case, that a meritorious consideration is sufficient; and Sir *Edward Sugden*, in the case of *Ellis* v. *Nimmo*, 1 L. & G., t. Sugd. 333, held, that a post-nuptial agreement, in writing, by which a father undertook to make a provision for a child, ought to be specifically performed, although founded only on a meritorious consideration. The decision, however, of Sir *Edward Sugden* must be considered now as distinctly overruled by Lord *Cottenham*, in *Jefferys* v. *Jefferys*, Cr. & Ph. 138, and *Dillon* v. *Coppin*, 4 My. & Cr. 647. See also *Holloway* v. *Headington*, 8 Sim. 324, per Sir *L. Shadwell*, V.-C.

Sir *J. Wigram*, V.-C., in commenting upon the different classes of cases on voluntary trusts, has observed, that "they are perhaps to be reconciled and explained upon the principle that a declaration of trust purports to be, and is in form and substance, a complete transaction, and the Court need not look beyond the declaration

of trust itself, or inquire into its origin, in order that it may be in a position to uphold and enforce it; whereas, an agreement or attempt to assign, is, in form and nature, incomplete, and the origin, of the transaction must be inquired into by the Court; and, where there is no consideration, the Court, upon its general principles, cannot complete what it finds imperfect: and there is a close analogy for this reasoning in the case of suits to enforce demands arising out of illicit dealings between parties. If, in such cases, the Court finds an account rendered, or other act done by one of the parties, upon which account or act, the Court can proceed without investigating the origin of the demand, it will do so. But it will not so proceed where the form of the transaction is such as to oblige the Court to go into the original illegal transaction, out of which the demand arises:" *M'Fadden* v. *Jenkyns*, 1 Hare, 462. See also *Davenport* v. *Whitmore*, 2 My. & Cr. 177, and the cases there cited.

Where a voluntary instrument, although effecting no transfer of property, creates a valid legal obligation, equity will give effect to it. Thus, where a person executes a bond (*Hall* v. *Palmer*, 3 Hare, 532), or even a promissory note (*Dawson* v. *Kearton*, 3 Sm. & Giff. 186; *Arthur* v. *Clarkson*, 35 Beav. 458), in favour of a volunteer, he may prove the debt against the assets of the debtor; but it will be postponed in equity to debts by simple contract: *Ramsden* v. *Jackson*, 1 Atk. 294. And see *Watson* v. *Parker*, 6 Beav. 283; *Dening* v. *Ware*, 22 Beav. 184; *Hales* v. *Cox*, 32 Beav. 118. A voluntary bond, however, will be preferred to interest upon debts not by law carrying interest payable under the 46th order of August, 1841: (Consol. Ord. xlii., 10) *Garrard* v. *Lord Dinorben*, 5 Hare, 213; and also to legacies, even those that are specific: *Patch* v. *Shore*, 2 Dr. & Sm. 589. And if it be doubtful whether a bond be voluntary or for valuable consideration, an issue may be directed: *Hepworth* v. *Heslop*, 6 Hare, 561.

But an assignee for value of an equitable interest in money payable under a voluntary bond has been held entitled to rank as a specialty creditor for value against the assets of the obligor: *Payne* v. *Mortimer*, 4 De G. & Jo. 447; 1 Giff. 118.

Where a person without consideration covenants to pay a sum of money, if the covenant is complete, and the Court is not called upon to do any act to make it perfect, it will give effect to a trust declared upon the covenant. Thus, in *Clough* v. *Lambert*, 10 Sim. 174, where a person, by a voluntary deed, for himself, his heirs, executors, and administrators, covenanted to pay an annuity to trustees, upon trust for his wife for her life, Sir *Lancelot*

Shadwell, V.-C., was of opinion that the covenant might be enforced by the wife against the executors of her husband, though not as against his creditors, and that the mere intervention of a trustee made no difference. See also *Fletcher* v. *Fletcher*, 4 Hare, 67, which shows, that, in the event of the trustee refusing or declining to sue on the covenant, equity will assist the cestui que trust, by enabling him to use the deed either at law or in equity. "My opinion," said Sir *J. Wigram*, V.-C., "is, that the plaintiff would be entitled to use the name of the trustee at law, or to recover the money in this Court, if it were unnecessary to have the right decided at law, and, where the legal right is clear, to have the use of the deed, if that use is material." In another part of his judgment, his Honor observes, "The rule against relief to volunteers cannot, I conceive, in a case like that before me, be stated higher than this—that a Court of equity will not, in favour of a volunteer, give to a deed any effect beyond what the law will give to it. But, if the author of the deed has subjected himself to a liability at law, and the legal liability comes regularly to be enforced in equity, the observation that the claimant is a volunteer is of no value in favour of those who represent the author of the deed;" and his Honor therefore, in that case, thought that, as there was no reason for trying the case at law, the decree ought to be for the payment of the money due upon the admission of the assets of the covenantor. See also *Williamson* v. *Codrington*, 1 Ves. 511; *Watson* v. *Parker*, 6 Beav. 283; *Lomas* v. *Wright*, 2 My. & K. 769; *Alexander* v. *Brame*, 19 Beav. 436; *Hales* v. *Cox*, 32 Beav. 118; *Bonfield* v. *Hassell*, Ib. 217; and the observations of Sir *John Romilly*, M. R., in *Bridge* v. *Bridge*, 16 Beav. 321.

In *Hervey* v. *Audland*, 14 Sim. 531, the executors of a person who had entered into a covenant for further assurance in a voluntary settlement having refused to perform it, the Court, in a suit instituted by a third party for the administration of the covenantor's estate, would not permit the covenantee to prove as a creditor under the decree in the administration suit, but gave him leave to bring such action as he should be advised. In the case, however, of *Cox* v. *Barnard*, 8 Hare, 310, a testator had assigned annuities, mortgage debts, and policies of assurance to volunteers, and entered into the usual covenant for further assurance. No notice of the deed was given in the lifetime of the testator to the mortgagors or grantors of the annuities. It was held, however, by Sir *J. L. Knight Bruce*, V.-C., in a suit to administer the assets of the testator, that the covenant could be enforced against them without re-

course to a Court of law. "The Court of Chancery," said his Honor, "undertook to administer the estates of deceased persons, and it was the duty of this Court to do so, if practicable, without sending parties to Courts of law; and there was no reason for sending this case to a Court of law. He did not say the Court would specifically perform the covenant; but all the covenantee required was damages, and those damages the Court of Chancery could in such a case estimate and give better than a Court of law. His Honor said that it was not necessary for him to decide, and he did not decide, whether, without the covenant for further assurance, the voluntary instrument would prevail; but the covenant being there, the Court would fasten upon it, and hold that the assignment operated to bind the estate." See also *Ward* v. *Audland*, 16 M. & W. 862; *Aulton* v. *Atkins*, 18 C. B. 249; *Patch* v. *Shore*, 11 W. R. (V.-C. K.) 142.

And where a person settled property by a voluntary deed with a trust for payment of debts due at his decease, voluntary bonds subsequently given have been held to be debts payable out of the trust property: *Markwell* v. *Markwell*, 34 Beav. 12.

Although a Court of equity will not upon a bill filed by a volunteer, give him any assistance (*Tufnell* v. *Constable*, 8 Sim. 69), yet, upon a bill filed by any of the parties to a deed from whom any valuable consideration moved, all the trusts will be carried into effect, even those in favour of volunteers: *Davenport* v. *Bishopp*, 2 Y. & C. C. C. 451, 1 Ph. 698; *Touche* v. *Metropolitan Railway Warehousing Co.*, 6 L. R. Ch. App. 671. And where two persons for valuable consideration, as between themselves, covenant to do some act for the benefit of a mere stranger, that stranger cannot enforce the covenant against the two, although either of the two might do so against the other: *Colyear* v. *Mulgrave*, 2 Kee. 81; *Hill* v. *Gomme*, 1 Beav. 540, 5 My. & Cr. 250; *Cramer* v. *Moore*, 3 Sm. & Giff. 141; *Joyce* v. *Hutton*, 11 Ir. Ch. Rep. 123; and see and consider *Kekewich* v. *Manning*, 1 De G. Mac. & G. 176; *Heap* v. *Tonge*, 8 Hare, 90, 103, 104; *Page* v. *Cox*, 10 Hare, 163, 169; *Harman* v. *Richards*, 10 Hare, 81, 88; *Westbury* v. *Clapp*, 12 W. R. (V.-C. W.) 511.

When once an instrument creating a valid and complete trust is duly sealed and delivered, the obligation is complete; the detention of the instrument by the grantor does not render it inoperative: *Doe* d. *Garnons* v. *Knight*, 5 B. & C. 671; *Exton* v. *Scott*, 6 Sim. 31; *Hall* v. *Palmer*, 3 Hare, 532; *Fletcher* v. *Fletcher*, 4 Hare, 67; *Re Way's Settlement*, 2 De G. Jo. & Sm. 365; *Bonfield* v. *Hassell*, 32 Beav. 217.

Voluntary deeds, when void against subsequent purchasers.

A voluntary settlement of real estate, whether freehold, copyhold, or leasehold, unless it be in favour of a charity (*Attorney-General* v. *The Corporation of Newcastle*, 5 Beav. 307, 12 C. & F. 402), will, under 27 Eliz. c. 4, be held fraudulent and void, as against subsequent purchasers for a valuable consideration from the settlor, including mortgagees (*Dolphin* v. *Aylward*, 4 L. R. Ho. Lo. 486), and lessees (*Doe* d. *Lewis* v. *Hopkins*, 9 East, 70, cited), and trustees taking under settlements for valuable consideration (*Watkins* v. *Steevens*, Nels. 160; *Doe* v. *Lewis*, 11 C. B. 1035; *even with notice* of the settlement, and although it is a fair provision for a wife and children; and the settlor will not be restrained from selling the settled estates; but, if the trust is complete, the volunteers will be entitled to the execution of it until the sale. (See *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84, 91, 93; *Buckle* v. *Mitchell*, 18 Ves. 100; *Metcalfe* v. *Pulvertoft*, 1 V. & B. 180; *Willats* v. *Busby*, 5 Beav. 193; *Stackpoole* v. *Stackpoole*, 4 D. & W. 320; *Clarke* v. *Wright*, 6 H. & N. 849.) And the law is the same when the voluntary settlement is made by a married woman: *Butterfield* v. *Heath*, 15 Beav. 408.

A voluntary settlement, however, will be defeated by a conveyance or settlement for value to the extent only necessary to give effect to the conveyance or settlement for value: *Croker* v. *Martin*, 1 Bligh, N. S., 573; 1 D. & C. 15. See also *Dolphin* v. *Aylward*, 4 L. R. Ho. Lo. 486. But it cannot be defeated by a subsequent judgment creditor, who can only have resort against such interest, if any, as remained in the settlor by virtue of, or unaffected by, the voluntary settlement. *Ib.*

A bonâ fide settlement, although voluntary, cannot be defeated by the conveyance for value of the heir or devisee of the settlor. See *Lewis* v. *Rees*, 3 K. & J. 132, and *Doe* d. *Newman* v. *Rusham*, 17 Q. B. 721; overruling *Jones*, *Lessee of Moffett*, v. *Whitaker*, Longfield & Townsend's Ir. Exch. Rep. 141. And it should be remembered that a deed, apparently voluntary, may be supported by collateral evidence, showing a contract for value: *Pott* v. *Todhunter*, 2 Coll. 76. And see *Ford* v. *Stuart*, 14 Beav. 493; *Kelson* v. *Kelson*, 10 Hare, 385; *Townend* v. *Toker*, 1 L. R. Ch. App. 446. And it has been held in a recent case in Ireland, upon the authority of *Prodgers* v. *Langham* (Sid. 133; and *George* v. *Milbanke*, 9 Ves. 190, 193), that a marriage may supply a sufficient consideration to a prior voluntary settlement, and will do so if a person was induced to marry the voluntary grantee by the provision so made for him or her: *Guardian*

Assurance Company v. *Viscount Avonmore*, 6 I. R. Eq. 391.

The settlor himself cannot come into a Court of equity to enforce the specific performance of a contract for the sale of the estate entered into by him after the settlement (*Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, T. & R. 294; *Clarke* v. *Willott*, 7 L. R. Exch. 313); except as against a purchaser willing to complete upon a good title being shown: *Peter* v. *Nicolls*, 11 L. R. Eq. 391; but a purchaser from the settlor can: *Currie* v. *Nind*, 1 My. & C. 17; *Daking* v. *Whimper*, 26 Beav. 568; *Rosher* v. *Williams*, 20 L. R. Eq. 210.

Where a voluntary settlement of land is avoided by a subsequent sale for valuable consideration, the volunteers have no equity against the purchase-money payable to the settlor. *Daking* v. *Whimper*, 26 Beav. 568.

Chattels personal do not come within the stat. 27 Eliz. c. 4; a voluntary settlement, therefore, of chattels personal cannot be defeated by a subsequent sale: *Sloane* v. *Cadogan*, 2 Sugd. V. and P., App. xxiv. ed. 11; *Jones* v. *Croucher*, 1 S. & S. 315.

It may be here mentioned, that the Courts considering the law under the statute 27 Eliz. c. 4, by which a person can indirectly get rid of a settlement, to be unsatisfactory, have held that a small and inadequate consideration is sufficient to support such a settlement: *Bayspool* v. *Collins*, 6 L. R. Ch. App. 228, 232; and see *Thompson* v. *Webster*, 4 De G. & J. 600; *Ford* v. *Stuart*, 15 Beav. 493; *Roe* v. *Mitton*, 2 Wils. 356; *Townend* v. *Toker*, 1 L. R. Ch. App. 446.

Voluntary deeds, when void against creditors.

By the statute, 13 Eliz. c. 5, a voluntary settlement of real or personal estate will be void, and may be set aside by a creditor of the settlor upon his showing an intent on the part of the settlor to delay, hinder, or defraud creditors. This intent may be actual and express (*Spirett* v. *Willows*, 3 De G. Jo. & Sm. 293), or it may be inferred in different ways, as, for instance, by the creditor showing that the settlor was indebted to the extent of insolvency, or even that he was largely indebted at the time of making the settlement: (*Fletcher* v. *Sedley*, 2 Vern. 490, and note; *Taylor* v. *Jones*, 2 Atk. 600; *Townsend* v. *Westmacott*, 2 Beav. 340; *Skarf* v. *Soulby*, 1 Mac. & G. 364; *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Re Magawley's Trust*, 5 De G. & Sm. 1; *Holmes* v. *Penney*, 3 K. & J. 90; *Barton* v. *Vanheythysen*, 11 Hare, 126; *French* v. *French*, 6 De G. Mac. & G. 95; *Clements* v. *Eccles*, 11 Ir. Eq. Rep. 229; *Neale* v. *Day*, 7 W. R. (V.-C. W.) 45; *Christy* v. *Courtenay*, 26 Beav. 140; *Penhall* v. *Elwin*, 1 Sm. & Giff. 258; *Acraman* v. *Corbett*, 1 J. & H.

410; *Elsey* v. *Cox*, 26 Beav. 95; *Thompson* v. *Webster*, 4 Drew. 628, 4 De G. & Jo. 600, 7 Jur. N. S., Ho. Lo. 531; *Murphy* v. *Abraham*, 15 Ir. Ch. Rep. 371; *Graham* v. *O'Keeffe*, 16 Ir. Ch. Rep. 1; *Crossley* v. *Elworthy*, 12 L. R. Eq. 158; *Cornish* v. *Clark*, 14 L. R. Eq. 1841; *Taylor* v. *Coenen*, 1 Ch. D. 636;) or that after deducting the property which was the subject of the settlement, sufficient available assets were not left for payment of the settlor's debts (*Freeman* v. *Pope*, 5 L. R. Ch. App. 538, 541), à fortiori, if by putting everything into settlement, the effect was to render the settlor absolutely insolvent, and to deprive him of the means of paying his debts: *Smith* v. *Cherrill*, 4 L. R. Eq. 390, 396; *Freeman* v. *Pope*, 5 L. R. Ch. App. 538; 9 L. R. Eq. 206; because in such cases the intention to defeat, hinder, or delay creditors within the meaning of the statute, would necessarily be inferred. See the remarks in the last two cases on *Spirett* v. *Willows*, 3 De G. Jo. & Sm. 293.

A creditor under a voluntary post obit bond, is as much entitled to the benefit of the statute of 13 Eliz. c. 5, as any other creditor. Where, therefore, a testator having executed a voluntary post obit bond for securing an annuity of 100*l.* to his daughter-in-law for her life, afterwards made a voluntary settlement, from and after his decease, in favour of his widow and child, comprising all his property (except about 300*l.*), and before his death acquired only about 1000*l.* more, it was held by Sir *G. M. Giffard*, V.-C., that the settlement was void under the statute as against the bond creditor: *Adames* v. *Hallett*, 6 L. R. Eq. 468.

The statute of 13 Eliz. c. 5, extends to future as well as existing debts, and a deed having for its object to defraud future creditors is void under that statute: as for instance, where a person settles all his present and future property (*Ware* v. *Gardner*, 7 L. R. Eq. 317, 321), or all his property with some small exception (*Reese River Silver Mining Company* v. *Atwell*, 7 L. R. Eq. 347; *Barling* v. *Bishop*, 29 Beav. 417), especially when he is about to engage in trade: *Mackay* v. *Douglas*, 14 L. R. Eq. 106.

If there be a creditor whose debt was incurred subsequently to the voluntary deed, and there is also at the time of filing the bill an unpaid creditor whose debt was incurred prior to the deed, the subsequent creditor has exactly the same right to file a bill as the prior creditor has: *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Freeman* v. *Pope*, 9 L. R. Eq. 206; 5 L. R. Ch. App. 538.

"But if a subsequent creditor files a bill, and it can be shown that the person who executed the deed, though indebted at the time he made it, has since paid every debt, it is very difficult to say

that he executed the settlement with an intention to defeat or delay creditors, since his subsequent payment shows that he had not such an intention." Per *Kindersley*, V.-C., in *Jenkyn* v. *Vaughan*, 3 Drew. 425.

And in the absence of actual intent to defraud creditors, a voluntary settlement made by a settlor in embarrassed circumstances, but having property not included in the settlement ample for the payment of debts owing by him at the time of making it, may be supported against creditors, although debts due at the date of the settlement may to a considerable amount remain unpaid: *Kent* v. *Riley*, 14 L. R. Eq. 190.

A creditor, however, may by his concurrence with or acquiescence in a deed voidable under 13 Eliz. c. 5, preclude himself and his representatives from impeaching such deed (*Olliver* v. *King*, 8 De G. Mac. & G. 110), especially if he has been a party with the donees to instruments and transactions proceeding on the assumption of its validity. *Ib.* And an inquiry may be directed whether any and which of the creditors of the settlor had acquiesced in a voluntary deed. *Freeman* v. *Pope*, 9 L. R. Eq. 212.

It may be here mentioned that a purchaser from a volunteer under a deed void by the statute of 13 Eliz. c. 5, will be preferred to the general creditors of the settlor having no specific charge: *George* v. *Milbanke*, 9 Ves. 190.

A voluntary deed executed, pendente lite, for the purpose of defeating any process in the nature of execution, will be set aside in equity: (*Blenkinsopp* v. *Blenkinsopp*, 12 Beav. 568, 1 De Gex Mac. & G. 495,) or where a man knows that a decision is about to be pronounced against him: *Barling* v. *Bishop*, 29 Beav. 417; *Reese River Silver Mining Company* v. *Atwell*, 7 L. R. Eq. 347.

Choses in action, having, since 1 & 2 Vict. c. 110, become available for the payment of debts under an execution, are within the statute against fraudulent conveyances. See *Stokoe* v. *Cowan*, 29 Beav. 637, where an assignment of a policy on his life by a person in extremis was set aside as fraudulent against his creditors. See also *Law* v. *The Indisputable Life Policy Company*, 1 K. & J. 223; *Robson* v. *M'Creight*, 25 Beav. 272.

The statute 13 Eliz. c. 5, s. 3, enacts that every party to a fraudulent conveyance "shall incur the penalty and forfeiture of one year's value of the said land," "and the whole of the value of the said goods," and "also being thereof lawfully convicted, shall suffer imprisonment for one half-year without bail or mainprise;" and with respect to this enactment, it has been held that a de-

fendant may refuse to answer interrogatories which would render him liable thereunder. *Wich* v. *Parker*, 22 Beav. 59.

In the recent case, however, of *Bunn* v. *Bunn*, 4 De G. Jo. & Sm. 316, where the defendants objected to make the usual affidavit as to documents, on the ground that the discovery would expose them to pains and penalties under 13 Eliz. c. 5, the Lords Justices of the Court of Appeal, affirming the decision of Sir *John Stuart*, V.-C., held that the discovery must be made.

There is a similar clause in 27 Eliz. c. 4. See sect. 3.

The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), contains a clause more stringent in some respects as against voluntary deeds executed by traders, than the statute of 13 Eliz. c. 5; it enacts that "Any settlement of property made by a trader (not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor, of property which has accrued to the settlor after marriage in right of his wife), shall, if the settlor becomes bankrupt within two years after the date of such settlement, be void as against the trustee of the bankrupt appointed under this act, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, be void as against such trustee . . . . 'Settlement' shall for the purposes of this section include any conveyance or transfer of property." Sect. 91.

This section is substituted for a somewhat similar one in section 126 of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), repealed by the Bankruptcy Repeal Act, 1869 (32 & 33 Vict. c. 38, secs. 2—20.)

The 91st section of the Bankruptcy Act, 1869, applies to settlements executed before, as well as after, the Act came into operation: *Ex parte Dawson, Re Dawson*, 19 L. R. Eq. 433.

Where a person makes a voluntary settlement of a mortgaged estate, covenanting with the trustees of the settlement to pay off the mortgage, he will be considered to have settled not merely the equity of redemption, but the whole property; and if his assets without the aid of such property are insufficient to pay the mortgage debt as well as his other debts, the settlement, although made more than two years before the bankruptcy of the settlor, will be void under the 91st section of the Bankruptcy Act, 1869:

Ex parte Huxtable, In re Conibeer, 2 Ch. D. 54.

It seems that in order to enable a creditor of a living debtor to set aside a fraudulent conveyance under the 13 Eliz. c. 5, it is not necessary that the creditor should have any lien or charging order on the property comprised in the conveyance, but in the absence of such lien, the Court will not apply the property in satisfaction of the creditor's claim. *Reese Silver Mining Company* v. *Atwell*, 7 L. R. Eq. 347. It seems, also, that a bill to set aside such a conveyance ought to be filed on behalf of all the creditors of the debtor. *Ib.*

A voluntary settlement, though void as against creditors, subsists for all other purposes. Suppose for instance a man by a voluntary deed, void as against his creditors, conveys real estate for the benefit of his wife and children, and afterwards becomes bankrupt, any surplus of the estate so settled will be bound by the trusts of the settlement. *Ex parte Bell*, 1 G. & J. 282; *French* v. *French*, 6 De G. M. & G. 95.

So in *Smith* v. *Cherrill*, 4 L. R. Eq. 390, a lady being indebted to the plaintiff at the time of her marriage in the sum of 350*l.*, settled all her real and personal property, (with the exception of jewels and furniture, exceeding in value the amount of her debt,) upon failure of issue of the marriage, in favour of certain collateral relatives, including a niece whom she had adopted as her daughter. The lady survived her husband, and died without issue, leaving no assets. It was held by Sir *R. Malins*, V.-C., first that the consideration of marriage not extending to collaterals, the ulterior limitations to them upon the authority of *Johnson* v. *Legard*, 3 Madd. 283; and *Cotterell* v. *Homer*, 13 Sim. 506, were voluntary. Secondly, that so far only as the sum of 350*l.* was concerned, the settlement was void, and ought to be set aside, and the debt being a charge upon her property, ought, if necessary, to be raised with interest.

Non-interference of Equity against bonâ-fide *voluntary instrument.*]—A Court of equity will not set aside a voluntary deed or agreement not obtained by fraud, by mistake, or against public policy, even if it be such as, according to the principles before laid down, it will not carry into effect. Equity stands neutral, and invariably follows the rule thus quaintly laid down in an old case, "that if a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, a Court of equity will not loose the fetters he hath put upon himself, but he must lie down under his own folly:" *Villers* v. *Beaumont*, 1 Vern. 101; *Bill* v. *Cureton*, 2 My. & K. 503; *Petre* v. *Espinasse*, 2 My. & K. 496; *Page* v.

Horne, 9 Beav. 570; 11 Beav. 227; *M'Donnell* v. *Hesilrige*, 16 Beav. 346; *De Houghton* v. *Money*, 1 L. R. Eq. 154; 35 Beav. 98; 2 L. R. Ch. 164. And the rule is the same whether the interference of equity is invoked by the settlor himself, or through the medium of a person, not a purchaser for value, claiming only through the settlor: *Dolphin* v. *Aylward*, 6 L. R. Ho. Lo. 486.

As we have before seen, a deed for valuable consideration not carrying out the intention of the parties may be so modified and rectified as to carry them out. (See note to *Lord Glenorchy* v. *Bosville*, ante, p. 18.) But in the case of a voluntary executory gift this is impossible. The instrument is either good or bad; it cannot be modified to suit former intentions, unless the donor consent to make a new and distinct instrument: *Phillipson* v. *Kerry*, 32 Beav. 628, 638. Secus it seems, if the trust be executed (*Thompson* v. *Whitmore*, 1 J. & H. 268), or if it be shown clearly after the settlor's death that the instrument was not prepared as he intended. *Lister* v. *Hodgson*, 4 L. R. Eq. 30, 34.

A person who receives a gift takes it subject to the conditions imposed by the donor. (*Seale* v. *Hayne*, 12 W. R. (V.-C. S.) 239.) And also subject to any mortgage of the subject-matter thereof by the donor, and he will not be able to call upon the personal representative of the donor to indemnify him therefrom, although the latter may have covenanted to pay the mortgage debt: *Owen* v. *Braddell*, 7 I. R. Eq. 358.

MACKRETH *v.* SYMMONS.

May 13th, 14th, Nov. 26th, 1808.

[REPORTED 15 VES. 329.]

VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY.] — *Vendor's lien for purchase-money unpaid, against the vendee, volunteers, and purchasers with notice, or having equitable interests only, claiming under him, unless clearly relinquished, of which another security taken and relied on may be evidence, according to the circumstances, the nature of the security, &c.: the proof being upon the purchaser; and, failing in part upon the circumstances, another security being relied on, may prevail as to the residue.*

As to marshalling the assets of the vendee by throwing the lien upon the estate, quære.

THE bill stated, that, in the years 1783 and 1784, the plaintiff was indebted to John Manners in several sums, amounting in the whole to 13,500*l.*; for which sums John Martindale, as surety, joined the plaintiff in bonds. In 1790, Martindale, having, upon a settlement of accounts with the plaintiff in 1785, *taken credit for payment to Manners of* 3000*l.*, *undertook to discharge the remaining* 10,500*l.*; and they settled an account accordingly. Other accounts were afterwards settled between them—the last in February, 1792; upon which a balance of 54,000*l.* was due to Martindale, including 10,393*l.* 17*s.*, *the value of annuities* granted by the plaintiff; against which Martindale agreed to indemnify the plaintiff, in consideration of the plaintiff's agreeing to pay him the amount. *A bond for* 20,000*l. was given accordingly;* and a mortgage in fee was executed by the plaintiff to Martindale for the balance of 54,000*l.*

By indentures of lease and release, dated the 30th and

31st of October, 1793, reciting an agreement by the plaintiff to sell the reversion of the mortgaged estates to Martindale, which was valued at 60,000*l.*, composed of the principal and interest due upon the mortgage, those estates were conveyed to Henry Martindale and his heirs, to the use of the plaintiff for life, with remainder to John Martindale in fee.

The bill further stated, that John Martindale *did not, according to his undertaking, pay the sum of* 13,500*l. to Manners,* nor *the value of the annuities ;* which sums constituted part of the consideration for his purchase of the reversion of the estate. In September, 1797, a commission of bankruptcy issued against him, under which Manners' representatives proved the debt upon the bonds, and received dividends ; the plaintiff being obliged to pay the remainder of the debt on account of those bonds, being 14,128*l.* 3*s.* 9*d.*, besides costs, and several sums on account of the annuities.

John Martindale, before his bankruptcy, had contracted to execute a mortgage to the defendant of the reversion comprised in the indentures of 1793 ; and the plaintiff, claiming a lien upon the estate for the payments he had made in consequence of Martindale's failure to fulfil his engagements, gave notice to the assignees under the commission. In 1798, Symmons obtained a decree, that the assignees should execute a mortgage of the reversion to him, expressly without prejudice to the plaintiff's claim ; and afterwards filed a bill of foreclosure against the assignees, and obtained a decree ; Mackreth not being a party to that suit. *The legal estate was vested in Coutts,* as a trustee, under a conveyance by Mackreth and Martindale in 1793, to secure annuities of 2000*l.*

The bill, filed by Mackreth, prayed a declaration, that the plaintiff has a lien upon the reversion of the estates, sold to Martindale and mortgaged to Symmons, for the payments he had been obliged to make, and those sums which he may hereafter pay in respect of annuities, &c.

The defendant Symmons, by his answer, denied that he had any notice, prior to his entering into the agree-

ment with Martindale, that the plaintiff had not received full consideration; and submitted that he had no lien.

Sir *Samuel Romilly* and Mr. *Wriottesley*, for the plaintiff.—The equitable lien of a vendor upon the estate sold for the purchase-money, as against the vendee, and even though a bond was taken, is established by a great number of cases, from *Chapman* v. *Tanner* (*a*), to *Nairn* v. *Prowse* (*b*). In *Austen* v. *Halsey* (*c*), your Lordship considered it as clearly settled, except where upon the contract evidently the lien by implication was not intended; and the case of *Hughes* v. *Kearney* (*d*) is another direct authority; Lord *Redesdale* laying down, as a very clear rule, that in all cases the vendor has the lien, and that it lies upon the purchaser to show a special agreement excluding it; that case being decided upon that ground. It cannot be admitted, certainly, against a purchaser for a valuable consideration without notice; but this defendant has not that character, having merely an equitable agreement for a security, not performed, when Martindale became a bankrupt, the plaintiff giving notice to the assignees, and the decree, obtained by the defendant Symmons, for a mortgage to him, expressing, that it was without prejudice to the claim of this plaintiff. Certainly, a former debt is sufficient to sustain a purchase as for a valuable consideration; but it is necessary that a party taking a conveyance for such a consideration should not have had notice of the claim when he took the conveyance. There are but two periods to which the point of notice can apply: first, the time when the consideration was advanced; secondly, when the conveyance was executed; and, even where a consideration has actually passed, it is necessary to state, in pleading, that there was no notice at either period, otherwise the purchaser cannot protect himself; *Wigg* v. *Wigg* (*e*). In this case it is essential that there should not have been notice at the later period, before which notice is clearly established. The estate was never properly out of the hands of the plaintiff. He had not taken a security carved out by

(*a*) 1 Vern. 267.
(*b*) 6 Ves. 752.
(*c*) 6 Ves. 475; see 483.
(*d*) 1 S. & L. 132.
(*e*) 1 Atk. 382.

himself, which might preclude the equitable lien he once had, which therefore still remains. From the nature of this transaction, the consideration being a former debt, no money actually passing, no such hardship can arise from enforcing the lien, as in the case of a purchaser for valuable consideration actually paid in that transaction, who is affected by notice.

If, however, this defendant is to be considered as a purchaser for valuable consideration without notice, so that the lien cannot prevail against him, the plaintiff is entitled to consider him only as a mortgagee, having contracted with Martindale, as against whom the lien is good, for a mortgage. This plaintiff, therefore, cannot be affected by the decree for a foreclosure obtained by this defendant, who, having notice of the plaintiff's claim, did not make him a party.

Mr. *Richards*, Mr. *Alexander*, and Mr. *William Agar*, for the defendant.—There is nothing in the circumstances of this case depriving this defendant of the protection due to a purchaser for valuable consideration without notice, his transaction with Martindale being perfectly fair; the vendor claiming a preference by way of lien for the purchase-money remaining unpaid, as an equitable charge, prior in time, though he took the security of Martindale to that extent. Under such circumstances the lien has never been established; nor can the inference necessary to maintain it be collected, either upon principle or authority. The general case of lien as between vendor and vendee, is admitted, where there is no special agreement, no security taken in respect of the purchase-money; but this equity has not been carried beyond that simple case of vendor and vendee. In the case of *Chapman* v. *Tanner* (*a*), there was a special agreement: the title-deeds were kept by the vendor, a deposit of the title-deeds of itself amounting to an equitable charge. Other cases, besides those which have been mentioned, in which this point arose, either directly or incidentally, are *Bond* v. *Kent* (*b*)—the case of a mortgage of the purchased estate for part of the money, and a note for the remainder; *Pollexfen* v. *Moore* (*c*)—a

(*a*) 1 Vern. 267.

(*b*) 2 Vern. 281.

(*c*) 3 Atk. 272.

very perplexed case, often cited; *Fawell* v. *Heelis* (*a*); *Blackburn* v. *Gregson* (*b*)—which is merely the opinion of Lord *Loughborough*, who desired to have the point further considered; *Trimmer* v. *Bayne* (*c*). The result of all of them is, that, where a security is given, there is no place for this equity, the purchaser certainly having to show that it does not exist. Here, a bond was given by Martindale; the security stipulated between the parties; and, therefore, the lien, substituted by equity, where there is no stipulation for a particular security, cannot be raised.

(*a*) Amb. 724; 1 Bro. C. C. 422, n. 3rd ed.; 2 Dick. 485.

(*b*) 1 Bro. C. C. 420.

(*c*) 9 Ves. 209.

Sir *Samuel Romilly*, in reply.—The plaintiff being called upon, and obliged to pay the debt, against which Martindale undertook to indemnify him, that undertaking forming the consideration of Martindale's purchase, he cannot, upon the ground of fraud, be permitted to retain the estate. The lien, therefore, is clear in respect of the 10,500*l*. The distinction as to the annuities rests upon the single circumstance, that a security by a bond of indemnity was taken, which is confined to the annuities. If this plaintiff had filed a bill against Martindale while in possession, he would have been compelled to pay the annuities out of the purchased estate, and a receiver would have been appointed. No stronger instance of bad faith, no act more unconscientious, can be stated, than taking an estate in consideration of making payments, and, by a direct violation of the contract, permitting those payments to fall upon the vendor.

As to this defendant, if, from the passage, appearing in the report of *Pollexfen* v. *Moore*, it is supposed that the lien cannot be extended to a purchaser from the original vendee, it would be perfectly ineffectual; but that proposition is contradicted by many authorities. In *Walker* v. *Preswick* (*d*) it is distinctly laid down, that the lien prevails against a purchaser with notice. Upon what principle can such a distinction between this and any other equity be maintained? The point is expressly decided in the same way in *Gibbons* v. *Baddall* (*e*), viz., if A. sells an estate, taking a promissory note for part of the purchase-money, and then the purchaser sells to B., who has notice

(*d*) 2 Ves. 622.

(*e*) 2 Eq. Ca. Abr. 682, n.

that A. had not received all the money, the land is in equity chargeable with the money due on the note. The defendant cannot be represented as a purchaser without notice, merely as not having notice when he advanced his money. It is true, not then having this estate in contemplation, he could not have notice at that time; but, to sustain a purchase as for valuable consideration without notice, it is essential that there should not have been notice either when the money was advanced, or when the conveyance was executed. That doctrine has been always held from the earliest period, in *More* v. *Mayhow* (*a*), to the time of Lord *Hardwicke*, in *Wigg* v. *Wigg* (*b*); and the reason is, that some suspicion arises from not taking the legal estate, when the money is advanced. The defendant, having the means, by acquiring the legal estate, of placing himself in a situation, in which the want of notice would avail, merely took an agreement; and, having only an equitable title, cannot maintain the plea of purchaser for valuable consideration without notice. The doctrine that certainly prevails between mortgagees, that, the equities being equal, a subsequent mortgagee, having got in the legal estate, may exclude a prior incumbrance, applies only where the money was advanced upon the credit of the estate; not where the estate was not in contemplation, and other securities were looked to, which is the case of this defendant, when he advanced his money; and upon that ground a judgment creditor, taking in a prior mortgage, cannot tack (*c*).

(*a*) 1 Ch. Ca. 34.

(*b*) 1 Atk. 382; *Tourville* v. *Naish*, 3 P. Wms. 307, where the notice was before payment of the money.

(*c*) *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491.

[The *Lord Chancellor* (*Eldon*).—With regard to the doctrine to which you are now alluding, is there any case where a third mortgagee has excluded the second, if the first mortgagee, when he conveyed to the third, knew of the second? When the case of *Maundrell* v. *Maundrell* (*d*) was before me, I looked for, but could not find, such a case—that, where there was bad faith on the part of the first mortgagee, that equity was applied (*e*).]

(*d*) 10 Ves. 246.

(*e*) See *Peacock* v. *Burt*, Coote, Mort. 693, where a third mortgagee without notice, taking a transfer from the first mortgagee who had notice of the second, was not affected by it.

Sir *Samuel Romilly*, in reply.—I do not believe that was ever decided; and there would be great difficulty in deciding it in favour of the third mortgagee, who puts

himself in the place of the first. The result of the authorities, and of the circumstances to which they are to be applied, is, that a part of the money, which was the consideration of the original purchase, remaining unpaid, the Court will raise the lien, and will enforce it against a second purchaser with notice; that universally the time of the conveyance, as well as the time of the advance, is material with regard to notice; and that this defendant clearly had notice before the conveyance.

Lord Chancellor Eldon.—Upon the special circumstances of this case I shall postpone my judgment; I should be very unwilling to leave some of the doctrine, that has been brought into controversy, with as much doubt upon it, as would be the consequence of deferring the judgment without taking some notice of it.

The settled doctrine, notwithstanding the case of *Fawell* v. *Heelis* (*a*), is, that unless there are circumstances such as we have been reasoning upon, *where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt indorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and the vendee, and persons claiming as volunteers, upon the doctrine of this Court, which, when it is settled, has the effect of contract, though perhaps no actual contract has taken place, a lien shall prevail; in the one case, for the whole consideration; in the other, for that part of the money which was not paid.* I take that to have been the settled doctrine at the time of the decision of *Blackburn* v. *Gregson* (*b*), which case so far shook the authority of *Fawell* v. *Heelis* as to relieve me from any apprehension, that Lord *Bathurst's* doctrine can be considered as affording the rule to be applied as between the vendor and vendee themselves, and persons claiming under them.

(*a*) Amb. 724; 1 Bro. C. C. 422, n. 3rd edit; 2 Dick. 485.

(*b*) 1 Bro. C. C. 420.

(*c*) 2 Dick. 730.

There is a case *Smith* v. *Hibbard* (*c*), reported nowhere but in Dickens, which seems to decide this point. There is also another case, besides those which have been men-

tioned, showing the opinion of Lord *Hardwicke*, that the lien prevails: *Harrison* v. *Southcote* (*a*), the case of a Papist vendor, for whom, Lord *Hardwicke* says, the lien would not be raised, as that would be giving an interest in land to a Papist; the specialty of that proving, that the lien prevails in general cases. In the case of *Elliot* v. *Edwards* (*b*), Lord *Alvanley* was very strong upon it. There was a covenant for payment of the money upon the first purchase, and also an undertaking by a surety—strong circumstances to show, that, as between the vendor and vendee, there is no intention to rely upon the lien. The point was not decided in that case; but Lord *Alvanley* lays down the doctrine as I have stated it, that even in the hands of another person, with notice, the lien remains. In *Gibbons* v. *Baddall* (*c*), the lien was held to be clear against a second purchaser, with notice. There is a very old case in Cary (*d*), which I have heard cited as one of this class; but I have some doubt whether it is not a case of equitable interposition upon another ground. The circumstance leading me to that doubt is, that there was a lost bond; and the modern doctrine of dispensing with *profert* (*e*), was not at that time known. The Lord Chancellor might, therefore, consider himself as having jurisdiction in that case to direct payment of the money due upon that bond out of the estate. In *Austin* v. *Halsey* (*f*), what I stated upon this subject was not said without much consideration. I had not at that time, nor have I now, the least doubt that it is the doctrine.

(*a*) 2 Ves. 389; see 393.

(*b*) 3 B. & P. 181; see 183.

(*c*) 2 Eq. Ca. Abr. 682, n.

(*d*) *Hearle* v. *Botelers*, Cary, 35.

(*e*) Profert dispensed with, where a bond is lost; see 5 Ves. 238, n., 2nd edit.

(*f*) 6 Ves. 475.

I have some doubt upon another point: taking the vendor to have the lien, whether the Court will, in case of the death of the vendee, marshal the assets, so as to throw the lien upon the purchased estate. It has often been said, and the case of *Coppin* v. *Coppin* (*g*) stated as an authority, that the Court will not do that. The Lord Chancellor, in his judgment, takes no notice of that point. In that case the vendor happened to be the heir of the vendee, so that the estate was at home; and it was held, that, being also the executor, he was entitled to retain the purchase-money out of the personal assets. That

(*g*) 2 P. Wms. 291; Sel. Ca. Ch. 28. See, however, *Trimmer* v. *Bayne*, 9 Ves. 209; *Sproule* v. *Prior*, 8 Sim. 189; *Selby* v. *Selby*, 4 Russ. 336; *Wythe* v. *Henniker*, 2 My. & K. 635.

decision requires a good deal of consideration. If the estate had been in a third person, the general doctrine, as to a person having two funds to resort to, might be thought to have an immediate application; and the express terms of the decree in *Pollexfen* v. *Moore* (*a*) might be found very inconsistent with it.

(*a*) 3 Atk. 272.

It is not, however, necessary to decide that point; as this is an equity, that in ordinary cases will affect a purchaser. Upon principle, without authority, I cannot doubt that it goes upon this, that *a person having got the estate of another, shall not, as between them, keep it, and not pay the consideration; and there is no doubt that a third person, having full knowledge that the other got the estate without payment, cannot maintain, that though a Court of equity will not permit him to keep it, he may give it to another person without payment.* It is not, however, necessary to discuss that upon general principles, as it has been repeatedly stated by authorities that ought, at this time, to bind upon that point.

Another principle, as matter of general law, is involved in this case; what shall be sufficient to make a case in which the lien can be said not to exist. It has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly, that a purchaser might be able to know, without the judgment of a court, in what cases it would, and in what it would not, exist. Lord *Bathurst* seems to have thought a note would put an end to it. Other judges, of very high authority, dissented from that; as appears by the cases of *Gibbons* v. *Baddall* (*b*) and *Hughes* v. *Kearney* (*c*). It does not necessarily follow from a written contract, giving another remedy, that the lien was not intended to exist. It is very difficult, then, to distinguish the case where a note or bond is given for part of the money. In the case of *Bond* v. *Kent* (*d*), where the estate sold was mortgaged for part of the money, and a note taken for the rest, there was strong

(*b*) 2 Eq. Ca. Abr. 682, n.

(*c*) 1 S. & L. 132.

(*d*) 2 Vern. 281.

negative evidence, that the vendor was not intended to be a mortgagee for the rest. The case put by the Master of the Rolls, in *Nairn* v. *Prowse* (*a*), of a mortgage upon another estate, also afforded strong, perhaps not quite conclusive, evidence against the lien, considering the value of the mortgaged estate—in general much more than the amount of the money. It does not, however, appear to me a violent conclusion, as between vendor and vendee, that, notwithstanding a mortgage, the lien should subsist. The principle has been carried this length: *that the lien exists, unless an intention, and a manifest intention, that it shall not exist appears.*

(*a*) 6 Ves. 752; see 760.

This case remains to be considered upon its own circumstances with reference to the points I have stated. The questions are, first, supposing the lien would have existed as to the gross sum, the debt to Manners and the annuities, or their value, whether the circumstances of silence as to the debt, and the indemnity taken against the annuities, which is very important, amount in equity to evidence of a manifest intention to abandon the lien; if they do, another very considerable point is, whether, the lien having been abandoned, the plaintiff can set himself up as a mortgagee, claiming to redeem the defendant. If the lien is to be considered as not abandoned, the question will be, not whether a purchaser, with notice, would be affected by the lien—which, as general doctrine, I admit,—but whether, under the circumstances attending the contract with, and conveyance to, this defendant, it shall prevail against him. Upon the particular circumstances, the case must stand for judgment.

Nov. 26th, 1808.

Lord Chancellor Eldon, having stated the case very particularly, and observing that the legal estate in the premises was, before the assignees of Martindale executed the agreement for a mortgage to Symmons, vested, under a former conveyance by Mackreth, in a trustee to secure annuities granted by him, pronounced the following judgment:

This case, when it was argued, and since, has appeared

to me to involve a question of very great importance, with regard to which I am not able to find any rule which is satisfactory to my mind. If I had found, laid down in distinct and inflexible terms, that, where the vendor of an estate takes a security for the consideration, he has no lien, that would be satisfactory; as, when a rule, so plain, is once communicated, the vendor, not taking an adequate security, loses the lien by his own fault. If, on the other hand, a rule has prevailed, as it seems to be, that it is to depend, not upon the circumstances of taking a security, but upon the nature of the security, as amounting to evidence, as it is sometimes called, or to declaration plain, or manifest intention, the expressions used upon other occasions, of a purpose to rely, not any longer upon the estate, but upon the personal credit of the individual, it is obvious that a vendor, taking a security, unless by evidence, manifest intention, or declaration plain, he shows his purpose, cannot know the situation in which he stands, without the judgment of a court, how far that security does contain the evidence, manifest intention, or declaration plain, upon that point. That observation is justified by a review of the authorities: from which it is clear that different judges would have determined the same case differently; and, if some of the cases that have been determined had come before me, I should not have been satisfied that the conclusion was right.

This bill insists upon a lien in respect of these annuities; to be paid all that the plaintiff himself has paid: and either as to the original value, or the present value, or the future payments. I state that claim in these different terms, as, to determine what is the lien, it is necessary to point out the amount of it, and how it is to be calculated. Some doubt was thrown in the argument upon the question of lien between the vendor and vendee; but it was not carried far; and it is too late to raise a doubt upon it: but it is insisted, that the lien does not prevail against third persons, even with notice of the situation of the vendor and vendee. It may be of use to state the cases upon this subject in the order of time.

The earliest case, not very applicable, is in Cary (*a*), and most of the Abridgments, which imperfectly collect the authorities upon this head. According to my own understanding, that case is to be classed rather among those of relief in equity upon a security that has been lost, than under this head: but the fact of its existence is a circumstance of evidence that this doctrine has obtained in professional practice. There is no other case between that and *Chapman* v. *Tanner* (*b*), which is very imperfectly reported; and its authority is weakened by the observation in subsequent cases, that there was a special agreement that the vendor should keep the writings; and it is stated as a fact, that he had not taken any security. Taking it to be a decision in favour of the lien under those circumstances, the declaration of the Court, which was the natural equity, shows strongly how the law upon this subject was understood; and that case, therefore, has considerable weight. The doctrine is probably derived from the civil law as to goods, which goes further than our law, by which, though the right of stoppage in transitu is founded upon natural justice and equity, yet if possession, either actual or constructive, was taken by the vendee, the lien is gone. That is not so by the civil law. The digest states (*c*): "Quod vendidi non aliter fit accipientis quam si aut pretium nobis solutum sit, aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ullâ satisfactione;" which points at this article of security; but with those excepted cases, the lien, according to the civil law, is so strong, that the goods may be taken out of the possession of the individual who had obtained actual or constructive possession of them.

(*a*) *Hearle* v. *Botclers*, Cary, 35.

Relief in equity upon a security lost. See 5 Ves. 238, n.

(*b*) 1 Vern. 267.

Vendor's lien probably derived from the Civil Law as to goods; which goes further than the law of England; by which the lien, giving the right to stop in transitu, is gone, where possession, actual or constructive, has been taken; the lien by civil law prevailing even against actual possession.

(*c*) Dig. lib. 18, tit. 1, l. 11; Inst., lib. 2, tit. 2, § 41.

The next case is *Bond* v. *Kent* (*d*), the circumstances of which are special—a mortgage for part of the money, and a note for the residue. It was urged with considerable, perhaps not conclusive, weight, that the express charge of a part gave a ground for the inference, that a lien for the residue was not intended. The case, however, goes to prove, that, in equity, this lien was supposed to exist;

(*d*) 2 Vern. 281.

amounting to an admission, that, without those special circumstances, there would have been a lien.

(a) 2 P. Wms. 291.
(b) 3 Atk. 272.
(c) 2 Eq. Ca. Abr. 682, n.

The next case is *Coppin* v. *Coppin* (a), where the doctrine of *Pollexfen* v. *Moore* (b), as to marshalling, was practically, though I doubt whether it ought to have been, admitted. I should mention *Gibbons* v. *Baddall* (c), where it is expressly stated, that the lien remained, though a note was given for part of the purchase-money; but I cannot ascertain the date of that decision. In *Pollexfen* v. *Moore*, Lord *Hardwicke* affirms the lien of the vendor upon the estate for the remainder of the purchase-money, considering the vendee from the time of the agreement a trustee as to the money for the vendor; but adds, that "this equity will not extend to a third person."

If that is to be understood, that this equity would not extend to a third person, who had notice that the money was not paid, Lord *Hardwicke's* subsequent decisions contradict that: if the meaning is, that he would follow the case of *Coppin* v. *Coppin*, and that, if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there is great difficulty in applying the principle; as it would then be in the power of the vendor to administer the assets as he pleases, having a lien upon the real estate to exhaust the personal assets, and disappoint all the creditors, who, if he had resorted to his lien, would have been satisfied; and in that respect, with reference to the principle, the case is anomalous.

(d) 2 Ves. 389; see 393.
(e) 2 Ves. 622.
(f) Amb. 724; 1 Bro. C. C. 422, n., 3rd edit.; 2 Dick. 485.
(g) 1 Black. 123; see 150.

The next case in which the doctrine was admitted is *Harrison* v. *Southcote* (d), followed by *Walker* v. *Preswick* (e); which case, it is remarkable, was not cited in *Fawell* v. *Heelis* (f): and in *Burgess* v. *Wheate* (g), Sir *Thomas Clarke* lays down the rule, both as to vendor and vendee, thus:—"Where conveyance is made prematurely, before money paid, the money is considered as a lien on that estate in the hands of the vendee. So, where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor for the personal representative of the purchaser." *Tardiffe* v.

Lien of Vendee, having paid prematurely, analogous to that of vendor.

Scrughan (*a*) is very material upon this point, as it is represented (*b*) as a case in which the lien was held to attach upon the two moieties of the estate; but it has been also considered (*c*) a case, whether of lien upon the land or not, for contribution upon the circumstances between the sisters: giving the one sister a right to call upon the husband of the other to pay a moiety of the annuity. In another case, also, *Powell* v. ——, whether accurate or not I cannot trace, Lord *Camden* determined in favour of the lien.

(*a*) Cited Amb. 725; 1 Bro. C. C. 423.

(*b*) 1 Bro. C. C. 423, in *Blackburn* v. *Gregson.*

(*c*) Amb. 726, in *Fawell* v. *Heelis.*

In *Fawell* v. *Heelis* (*d*), Lord *Bathurst's* opinion certainly was, for reasons best stated in the case of *Nairn* v. *Prowse* (*e*) by Sir *Samuel Romilly*, that the bonds taken by the vendor furnished evidence, that credit was not given to the land; and therefore there was no lien. In *Beckett* v. *Cordley* (*f*), Lord *Thurlow* says, it was compared to a person selling an estate, and not receiving the money; and, therefore, there is a lien: asserting the general doctrine as familiar, but distinguishing that case upon the nature of the transaction: younger children joining the eldest in a mortgage; discharging the estate from their portions; and by their consent the whole money being paid to the eldest son: the lien being discharged by that transaction.

(*d*) Amb. 724; 1 Bro. C. C. 422, n. 3rd edit.; 2 Dick. 485.

(*e*) 6 Ves. 752.

(*f*) 1 Bro. C. C. 353; see 358.

In the argument of *Blackburn* v. *Gregson* (*g*), Lord *Kenyon* took the doctrine to be perfectly clear; and it is not possible to state a stronger judicial opinion than Lord *Loughborough* expressed, that the lien does exist, though it is not a decision. In *Smith* v. *Hibberd* (*h*), it was insisted that the delivery of possession, upon payment of a small part of the money, was evidence that he meant to trust to the personal security; but it was held clear, that the money contracted to be paid was a specific lien upon the premises. The contract for payment of the money is itself, in a sense, a security full as good as a note. I do not state, as an authority, what appears upon this subject in *Austen* v. *Halsey* (*i*), as it is a mere dictum, and a dictum that fell from me; but, endeavouring to state this doctrine as accurately as I could, I see I expressed it in

(*g*) 1 Bro. C. C. 420.

(*h*) 2 Dick. 730.

(*i*) 6 Ves. 475

(a) 6 Ves. 483. these words (a): "That the vendor has a lien for the purchase-money, while the estate is in the hands of the vendee. I except the case where upon the contract evidently that lien by implication was not intended to be reserved."

(b) 3 B. & P. 181; see 183. In the case of *Elliott* v. *Edwards* (b), this is the doctrine of Lord *Alvanley*, a very experienced judge in equity, with reference to whom I may say, his judgments will be read and valued as producing great information and instruction to those who may practise in Courts of equity in future times. He there states, that, if a man, having purchased an estate, conveys it before the purchase-money has been paid, a Court of equity will compel the person to whom the estate was conveyed to pay that money, provided he knew at the time he took the conveyance that it had not been paid.

(c) 6 Ves. 752 The next case in equity is *Nairn* v. *Prowse* (c), before the Master of the Rolls, in which it was contended that there was no lien; the vendor had taken a security for the money, payable at a future time, and during the interval the vendee might have sold the stock. The Master of the Rolls, in his judgment, admitting the general doctrine as to the vendor's lien, observes upon the question, whether a security taken will be a waiver, that by conveying the estate without payment a degree of credit is given to the vendee, which may be given upon the confidence of the existence of such lien; and it may be argued, that taking a note or a bond cannot materially vary the case; a credit is still given to him, and may be given from the same motive, not to supersede the lien, but for the purpose of ascertaining the debt, and countervailing the receipt indorsed upon the conveyance. There is great difficulty to conceive how it should have been reasoned, almost in any case, that the circumstance of taking a security was evidence that the lien was given up, as in most cases there is a contract under seal for payment of the money. The Master of the Rolls, having before observed that there may be a security, which will have the effect of a waiver, proceeds to express his

opinion, that, if the security be totally distinct and independent, it will then become a case of substitution for the lien, instead of a credit given on account of the lien; meaning that, not a security, but the nature of the security, may amount to satisfactory evidence that a lien was not intended to be reserved, and puts the case of a mortgage of another estate, or any other pledge, as evidence of an intention that the estate sold shall remain free and unencumbered. It must not, however, be understood that a mortgage taken is to be considered as a conclusive ground for the inference that a lien was not intended, as I could put many instances that a mortgage of another estate for the purchase-money would not be decisive evidence of an intention to give up the lien, though, in the ordinary case, a man has always greater security for his money upon a mortgage than value for his money upon a purchase; and the question must be, whether, under the circumstances of that particular case, attending to the worth of that very mortgage, the inference arises. In the instance of a pledge of stock, does it necessarily follow that the vendor, consulting the convenience of the purchaser by permitting him to have the chance of the benefit, therefore gives up the lien which he has? Under all the circumstances of that case the judgment of the Master of the Rolls was satisfied that the conclusion did follow; but the doctrine as to taking a mortgage, or a pledge, would be carried too far if it is understood, as applicable to all cases, that a man taking one pledge therefore necessarily gives up another; which must, I think, be laid down upon the circumstances of each case, rather than universally. In the case of *Hughes* v. *Kearney* (*a*) Lord *Redesdale* states the doctrine; and the proposition is, not merely that the vendor might have security, but that he relied upon it; and a note or bills are considered not as a security, but as a mode of payment.

(*a*) 1 S. & L. 132.

From all these authorities the inference is, *first, that, generally speaking, there is such a lien; secondly, that in those general cases in which there would be the lien, as*

between vendor and vendee, the vendor will have the lien against a third person, who had notice that the money was not paid. Those two points seem to be clearly settled. I do not hesitate to say, that, if I had found no authority that the lien would attach upon a third person, having notice, I should have had no difficulty in deciding that upon principle, as I cannot perceive the difference between this species of lien and other equities, by which third persons, having notice, are bound. In the case of a conveyance to B., the money being paid by A., B. is a trustee; and C. taking from him, and having notice of the payment by A., would also be a trustee, and many other instances may be put.

Where a security is taken for unpaid purchase-money, the existence of the lien depends upon the question, whether it was intended to be reserved or whether credit was exclusively given to the person from whom the security was taken.

The more modern authorities upon this subject have brought it to this inconvenient state—that the question is not a dry question upon the fact, whether a security was taken, but it depends upon the circumstances of each case whether the Court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken.

In this case, having, as other judges have had, to determine this question of intention upon circumstances, I may mistake the fair result of the circumstances which I have endeavoured to collect. I must say I have felt from the first, that there is, upon the part of the plaintiff, that natural justice and equity, which excite a wish, that I could enforce a lien throughout; but, first, as to the annuities, I am persuaded, that, with reference to that part of the case involving the question of lien as to the consideration, or any part of it, or any sum of money, the quantum of which is to be estimated with reference to the present value, or the past or future payments, this is a case in which the plaintiff intended to rely entirely upon the personal security, the bond for 20,000*l.*; and that was the conception of Martindale also; by whose default of payment, therefore, the estate is not now subject to the lien in respect of the consideration of the annuities, or of any allowance in respect of it. See how

As to the annuities, the plaintiff intended to rely entirely upon the personal security.

it stands. In 1790, the plaintiff, as principal, and Martindale, as surety, being engaged in an obligation, which I understand to be a personal one, for these annuities, agree to change situations; Martindale to be the principal, and the plaintiff to be surety; in consideration of which the plaintiff agrees to give 9000*l.*, secured by a mortgage. It rests upon that until 1793, when the transaction takes this course: that Martindale shall be no longer a mortgagee, but owner of the reversion in fee, and, which is material, of the reversion expectant upon the plaintiff's life estate. The annuities remain upon the old footing; that is, some payments were made, or arrears accrued, betwen 1792 and 1793, and payments were to arise from time to time. The value given to Martindale, in 1792, by the mortgage of 9000*l.*, for taking the liability upon himself, was a value which merely, by the lapse of time, between 1792 and 1793, must have varied. If the annuities had been paid there must have been a difference in the estimation; also, de anno in annum, the value was decreasing, not only as the annuities were wearing out, but also as the number of the annuitants was decreasing by death. It is impossible, it is not natural, to suppose, that parties dealing for the consideration of annuities and the purchase of a reversion, which might not take effect in possession until all the annuitants were dead, relied on that reversion as security, in addition to the indemnity by the bond for 20,000*l.*; in the original transaction the estate being pledged for the sum of 9,000*l.*, as if actually paid.

Then, as to the lien, for what is it? Is it for the original sum? That it cannot in justice be. Is it for future payments—that, one sum being paid, it does not attach? another sum not being paid, it does attach? a charge upon the reversion arising from time to time, accordingly as these payments are, or are not, made? And is that inference to be drawn where a conveyance was executed without the least notice of such an intention—a security taken, not of itself sufficient to exclude the purpose of such a lien? but the nature of the subject, connected

with the fact of that security taken, is decisive proof against such an intention; and it appears accordingly in the other cause, *Symmons* v. *Rankin,* that Mackreth and Martindale joined in the conveyance to Coutts, to secure an annuity of 2000*l.*, without the least reference to such an intention.

(*a*) See *Blackburn* v. *Gregson,* 1 Bro. C. C. 420.
(*b*) *Tardiffe* v. *Scrughan,* stated 1 Bro. C. C. 423.

I admit, that the opinion of Lord *Loughborough* (*a*), that the case, before Lord *Camden* (*b*), went upon the ground of lien, is an authority very considerably against my opinion; and I cannot say upon what the case did proceed, if not upon that ground; as the estate, given by the wife to her husband for his life, after her own death, if not affected by the lien, could not be bound to pay the annuity. If that case is accurately represented, Lord *Camden's* opinion seems to have been that the mere circumstance of an estate given in consideration of an annuity, with a bond, would not prevent the lien attaching from time to time; and so, understanding it, I cannot bring my mind to the conclusion that it is an authority which ought to lead me to determine, that, with reference to these annuities, there is a lien, either for the original value, the present value, or the future payment, which may or may not become due.

Although no lien as to the annuities, lien as to the gross sums unpaid by vendee was intended.

As to the other part of the case, I have considered long, whether the conclusion is just, that, not meaning to have a lien, as I think this party did not, with regard to the annuities, he should mean to have a lien as to the sum of money due to Manners. My individual opinion is that the intention was the same as to both; but, with regard to the latter, the cases authorise the lien; unless it is destroyed by particular circumstances, which do not exist here. That sum is precisely in the condition of a part of the consideration, not paid; and then the inference in equity, unless there are strong circumstances, getting over it, is, that a lien was intended. This comes very near the doctrine of *Sir Thomas Clarke* (*a*), which is very sensible; that, where the conveyance, or the payment, has been made by surprise, there shall be a lien. This plaintiff understood at the time of the

(*a*) *Burgess* v. *Wheate,* 1 Black. 150.

conveyance, that this money was to be paid on his account to Manners; which is the same as if it was to have been paid to himself, and was not paid; and then the only question is, whether, as, from the special circumstances as to the value and nature of the annuities, I am to infer that a lien was not intended as to them, I must make the same inference with respect to this gross sum; as to which, if the annuities were not mixed with the transaction, the doctrine of equity is, that the lien would attach. As to that sum, my judgment is, that the plaintiff has a lien.

It is contended that there are other circumstances in this case; that the defendant, Symmons, has a conveyance of the estate without notice, or, rather, a contract; as he had notice at the time of the conveyance. It is not necessary to go into the doctrine as to the effect of notice at the time of the contract, or at the time of payment of the money; though there is no doubt the defendant, when he took his conveyance, had notice from the recitals in his title-deed of Mackreth's rights and Martindale's obligations, as vendor and vendee. Neither is it necessary to go into the consideration of another argument; that the defendant's money was not originally lent upon the faith of the land. There is a great difference between the effect of a judgment as, attaching upon the land, and a special agreement by a creditor for a security upon the land. It is not, however, necessary to determine such questions; as neither the plaintiff nor the defendant Symmons has the legal estate, which appears in the other cause, *Symmons* v. *Rankin*, to be in Coutts, under the *conveyance* of 1793, in which Martindale and Mackreth joined; and then, between equities and the rule "Qui prior est tempore potior est jure," applies.

Rule between equities: "Qui prior est tempore potior est jure."

The result of this case is, that the bill must be dismissed as it regards the annuities, and is right as to the other part of the claim; and, being right in one point, and wrong in the other, the decree must be without costs.

This rule only applies when the equities are equal. See *Rice* v. *Rice*, 2 Drew. 1.

This case was mentioned by way of motion to vary the minutes, upon a misunderstanding as to the costs.

Lord Chancellor Eldon, having repeated the ground upon which no costs were given, made the following additional observations :—

Since the judgment was pronounced, I have met with a case which was not cited in the argument, but is referred to in Mr. Sugden's work (*a*), which seems to me to be a book of considerable merit (*b*), in which this subject is considered with much attention, and he comes to a conclusion different from mine. I looked into the Registrar's Book for that case, the name of which I do not recollect; and it does seem to me that his inference is not the necessary inference, arising from the circumstances of that case, as I find it in the Registrar's Book. I mention this, to show that I have not withdrawn from the opinion I have expressed upon this subject; as to which, conceiving it to be of great importance, I should, if convinced, be very ready to retract; but, having endeavoured to collect all the doctrine of the Court upon it, I am sure I am right in that. I wish I was as sure in the application of the evidence.

(*a*) The case alluded to by the Lord Chancellor appears to be *Comer* v. *Walkley*, stated 356, 2nd edit. ; 465, 866, 11th edit., Sugd. V. & P.

(*b*) The work on Vendors and Purchasers, the 14th edition of which appeared in the year 1862.

In the important and leading case of *Mackreth* v. *Symmons*, Lord *Eldon*, in his elaborate and learned judgment, very fully examines the authorities upon the doctrine of the vendor's equitable lien for unpaid purchase-money. The doctrine itself, which at the present day is seldom, if ever, brought into dispute, is thus stated by Lord *Eldon* in the principal case :—" Where," observes his Lordship, " the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt indorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and the vendee, and persons claiming as volunteers, upon the doctrine of this Court, which, when it is settled, has the effect of a contract, though perhaps no actual contract has taken place, a lien shall prevail; in the one case, for the whole consideration; in the other, for that part of the money which was not paid." See also *Chapman* v. *Tanner*, 1 Vern. 267 ; *Austen* v. *Halsey*, 6 Ves. 475 ; and the vendor of land to a railway company will have

a lien thereon in respect of unpaid compensation as well as purchase-money (*Walker* v. *The Ware, Hadham, and Buntingford Railway Company*, 1 L. R. Eq. 195, 35 Beav. 52), unless such compensation is the subject of a separate agreement between him and the company (Ib.), and he is not deprived of such lien by a deposit and bond under the 85th section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), (Ib.), or by accepting a deposit in the names of trustees in lieu of the statutory deposit, if the purchase and compensation moneys exceed the deposited sum, (Ib.); and also as against another Company, lessee of the Company which made the purchase (*Bishop of Winchester* v. *Mid-Hants Railway Company*, 5 L. R. Eq. 17; *Cosens* v. *Bognor Railway Company*, 1 L. R. Ch. App. 594); and the Court of Equity will, although the railway may have been made over the land, and opened for public use, enforce the lien by sale (Ib.), (*Wing* v. *Tottenham and Hampstead Junction Railway Company*, 3 L. R. Ch. App. 740; *Walker* v. *The Ware, Hadham, and Buntingford Railway Company*, 1 L. R. Eq. 195; 35 Beav. 52), and will in the meantime appoint a receiver; but it is now ultimately settled, overruling on that point the cases of *Cosens* v. *Bognor Railway Company*, 1 L. R. Ch. App. 594, (where, however, *Turner*, L.J., was in favour of a receiver) and *Earl St. Germains* v. *Crystal Palace Railway Company*, 11 L. R. Eq. 568, that the Court will not grant an injunction to restrain the Company from running trains or engines over the land until the payment of the purchase-money of the land agreed to be taken (*Pell* v. *Northampton and Banbury Junction Railway Company*, 2 L. R. Ch. App. 100; *Munns* v. *Isle of Wight Railway Company*, 5 L. R. Ch. App. 414; reversing the decision of Sir *W. M. James*, V.-C., reported, 8 L. R. Eq. 653. *Lycett* v. *Stafford and Uttoxeter Railway Company*, 13 L. R. Eq. 261; and see and consider *Bishop of Winchester* v. *Mid-Hants Railway Company*, 5 L. R. Eq. 17); unless, perhaps, the Company were destroying the property (*Pell* v. *Northampton and Banbury Junction Railway Company*, 2 L. R. Ch. App. 101, per *Turner*, L.J.); but it would seem in such a case it would be more proper to apply to have the purchase-money paid into Court. Ib. 102, *Cairns*, L.J.

Where a decree had been obtained by a vendor against a Railway Company for specific performance of a contract for sale, in which inquiries were directed to ascertain the amount due for damages and costs, and the amount, when found due, together with the purchase-money, was ordered to be paid, but was not declared to be a charge on

the land, it was held by Lord *Romilly*, M. R., that the vendor was not entitled, under the liberty to apply, to enforce by petition a lien on the land for the sums due, especially as there were incumbrancers not parties to the suit, whose rights would be affected by such lien (*Attorney-General* v. *Sittingbourne and Sheerness Railway Company*, 1 L. R. Eq. 636; 35 Beav. 268).

Where land is taken by a Railway Company, and the purchase-money ascertained by *arbitration* under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), has been paid, the vendor is not entitled to a lien on the land sold for the costs of the arbitration payable to him by the Company: *Earl Ferrers* v. *Stafford and Uttoxeter Railway Company*, 13 L. R. Eq. 524.

The lien also attaches if possession of the estate has been delivered to the purchaser, although there has been no conveyance of it to him (*Smith* v. *Hibbard*, 2 Dick. 730; *Charles* v. *Andrews*, 9 Mod. 153; *Topham* v. *Constantine*, Taml. 135; *Evans* v. *Tweedy*, 1 Beav. 55; *Andrew* v. *Andrew*, 8 De G. M. & G. 336; *Langstaff* v. *Nicholson*, 25 Beav. 160); and upon copyholds and leaseholds, as well as freeholds (*Winter* v. *Lord Anson*, 3 Russ. 492; *Matthew* v. *Bowler*, 6 Hare, 110; *Wront* v. *Dawes*, 25 Beav. 369).

When, however, the vendor has taken from the purchaser a security for the unpaid purchase-money, the question arises, whether that amounts to an abandonment of the lien; for its existence must be decided, not as a dry question of fact, whether a security was taken, for the mere taking of a security is not a waiver of the lien, but it depends upon the circumstances of each case, whether the Court is to infer, that the lien *was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the security was taken.*

The inconvenience of such a doctrine, so unsatisfactory and productive of litigation, may well have caused Lord *Eldon* to observe, in the principal case, "that it would have been better at once to have held, that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly, that a purchaser might be able to know, without the judgment of a Court, in what cases it would, and in what cases it would not, exist."

It is now settled, that a mere personal security for the purchase-money, as a bond (*Hearle* v. *Botelers*, Cary, 35, and *Winter* v. *Anson*, 3 Russ. 488, reversing the decision of Sir *J. Leach*, V.-C., 1 S. & S. 434; *Collins* v. *Collins*, 31 Beav. 346), a bill of exchange, *Teed* v. *Carruthers*, 2 Y. & C. C.

C. 31; although with a surety (*Hughes* v. *Kearney*, 1 S. & L. 136; *Grant* v. *Mills*, 2 V. & B. 306), or a promissory note (*Gibbons* v. *Baddall*, 2 Eq. Ca. Abr. 682, n.; *Hughes* v. *Kearney*, 1 S. & L. 132; *Ex parte Peake*, 1 Madd. 346; *Ex parte Loaring*, 2 Rose, 79), will not, without more, be sufficient evidence of the intention of the vendor to give credit exclusively to the purchaser, or to his security, so as to take away the lien.

In *Winter* v. *Lord Anson*, 1 S. & S. 434, there was an agreement for the sale of an estate, by which it was, amongst other things, agreed that the amount of the consideration-money should be secured by the bond of the purchaser to the vendor, with interest at 4*l.* per cent., and should remain so secured, *during the life of the vendor*, on the regular payment of interest. A conveyance was executed, *in pursuance of the agreement, and in consideration of the purchase-money therein expressed* to *have been paid*, and the vendor's receipt was indorsed upon it. Part only of the purchase-money had, in fact, been paid, and the residue was secured by bond conditioned to be void on payment by the vendee, to the executors, administrators, or assigns of the vendor of the residue of the purchase-money within twelve months next after the decease of the vendor, with interest at 4*l.* per cent. Sir *J. Leach*, M.R., although he at first decided in favour of the lien, afterwards decided against it, upon the ground that the case was, in principle, the same as if the conveyance had stated the real contract of the parties; and that, by the effect of that contract, the vendor agreed to part with his estate *in consideration of the bond for the future* payment of the price; and that, when such bond was executed, the estate passed to the vendee in equity, as well as at law. "Suppose," observed his Honor, "it had been expressed in this conveyance, that the price was not to be paid until the death of the vendor, and there had been a covenant on the part of the purchaser then to pay the amount, and to pay the interest in the meantime; could it then have been said that it appeared by this deed that the vendor had contracted not to part with his estate until the actual payment of the price? Would it not rather have been the true effect of the language of the conveyance in such case, that the vendor had contracted to part with his estate presently, and not in consideration of the actual immediate payment of the price, but *in consideration of the covenant for the future payment of that sum*, with interim interest; and that having, therefore, the covenant, which was the consideration bargained for, the estate must pass by the conveyance in equity, as well as at law?" This decision was reversed by Lord *Lynd-*

hurst, who held, that the circumstance, that the money was secured to be paid at a future day, did not affect the lien. "I do not think," said his Lordship, "that the lien is affected by the fact of the period of payment being dependent on the life of the vendor. That circumstance does not appear to me to afford such clear and convincing evidence of the intention of the vendor to rely, not upon the security of the estate, but solely upon the personal credit of the vendee, as would be necessary in order to get rid of the lien. It would not be inconsistent with an express pledge; and I do not perceive why it is at variance with the lien resulting from the rules of a Court of Equity;" 3 Russ. 488. An appeal was lodged in the House of Lords against this decision, but it was afterwards withdrawn: Sugd. V. & P. 258, 11th edit.

Where an estate is conveyed, in consideration of an annuity, the vendor will have a lien upon the land for the annuity, although a bond or covenant is given to secure the payment of the annuity. See *Tardiffe* v. *Scrughan*, 1 Bro. C. C. 423, where Lord *Camden's* opinion seems to have been, that the mere circumstance of an estate being given in consideration of an annuity, with a bond, would not prevent the lien attaching from time to time: *Blackburn* v. *Greyson*, 1 Bro. C. C. 420. In *Clarke* v. *Royle*, 3 Sm. 502, Sir *L. Shadwell*, V.-C., is reported to have said, that it appeared to him that Lord *Eldon*, in *Mackreth* v. *Symmons*, had expressly overruled the decision of Lord *Camden* in *Tardiffe* v. *Scrughan*. However, in *Buckland* v. *Pocknell*, 13 Sim. 412, his Honor, in allusion to what he was reported to have said in *Clarke* v. *Boyle*, observes, "I think that, if that were said in those very terms, it was said too strongly; because it cannot be said that my Lord *Eldon* did overrule *Tardiffe* v. *Scrughan;* although I think that it may be fairly inferred from the remarks that he made upon that case, in his judgment in *Mackreth* v. *Symmons*, that he was not satisfied with the decision in all its parts. He shows, as it strikes me, an inclination to criticise it, and to escape from it, if the circumstances of the case before him would allow him to do so. But I do not wish it to be understood to be my opinion, that he overruled it point blank." In the case of *Matthew* v. *Bowler*, 6 Hare, 110, where there was a sale and assignment of a life interest in leaseholds in *consideration of a weekly sum*, to be paid to the vendor during her life, with *a covenant by* the purchaser, for himself, his heirs, executors, and administrators, to make the weekly payment to the vendor, and to repair and insure the premises, and otherwise perform the covenants in the lease; it was held, by Sir *James Wigram*, V.-C.,

that the vendor was entitled to a lien on the life interest in the leaseholds, which was the subject of the assignment for the weekly payment. His Honor said, "That, if the case of *Tardiffe* v. *Scrughan* was not approved, it certainly was not overruled by Lord *Eldon*. The case had been much considered by Sir *Edward Sugden;* and it was clear that his opinion was, that the lien in such a case ought to be sustained. He should be most reluctant to come to a different conclusion. He was of opinion, in this case, that the plaintiff was entitled to the lien claimed by her bill. The purpose of the covenants in the deed to uphold the property could scarcely be understood, unless the property was intended to constitute a security."

Upon examining carefully that branch of the principal case which relates to the lien claimed for the annuities, it will be found, notwithstanding the ambiguity of Lord *Eldon's* language, that it may be reconciled with *Tardiffe* v. *Scrughan* and *Matthew* v. *Bowler;* for Lord *Eldon* did not, as a bare abstract point of law, decide that there is no lien where an estate is sold in consideration of an annuity secured by a bond or covenant; but he considered that the *special circumstances of the case* showed that the vendor *intended to rely upon the personal security*, viz., the bond for 20,000*l.*, and that such was the conception also of the vendee. The principle, therefore, upon which that branch of *Mackreth* v. *Symmons* was decided, is certainly correct; but it has been doubted by an eminent writer, whether the circumstances of the case were such as justified Lord *Eldon* in coming to the conclusion, that it was the intention of the vendor to rely upon the personal security, and thus discharge the lien for the annuities. See Sugd. V. & P. 869, 11th edit.

In *Clarke* v. *Royle*, 3 Sim. 499, the conveyance was made in *consideration of the vendee entering into covenants therein contained for payment of an annuity to the vendor, and* 3000*l. to certain persons in the event of the vendee's marrying.* Sir *L. Shadwell*, V.-C., distinguishing the case from *Tardiffe* v. *Scrughan*, held, that there was no lien, on the ground that the deed plainly marked out, that the *consideration on the one side, was the conveyance of the estate, and, on the other, the entering into the covenants.* "Why," he asked, "am I to declare, that, in respect of this annuity, and of the sum which is payable on a contingency, and which, therefore, never may be payable, there is to be a lien on the purchased estates? Why should I go further than any of the cases that have been hitherto decided upon the subject of lien on purchased estates, and do that which appears to be contrary to the intention of the parties? I consider that this case is decided

by the authority of *Winter* v. *Lord Anson*." It may be here remarked, that the Vice-Chancellor does not appear to have been aware that the decision of Sir *J. Leach* had been reversed by Lord *Lyndhurst*. However, it is presumed that *Clarke* v. *Royle* is still a binding authority, because there a case actually arose similar to that which Sir *J. Leach* assumed, though wrongly, to exist in *Winter* v. *Lord Anson*. In that case, the conveyance, though expressed to be made in pursuance of the agreement (which, however, was to take a bond, and not a covenant), did not otherwise refer to it, and was expressed to be made, not in consideration of the agreement, but *in consideration of a sum of money*. In *Clarke* v. *Royle*, the conveyance was *in consideration of certain covenants being entered into* by the purchaser; the covenants, therefore, plainly formed the consideration, and the lien was gone.

Upon the same principle it has been held, that, where a receipt was given by the vendor for a bond, as the consideration for an estate, the lien was gone; thus, in *Parrott* v. *Sweetland*, 3 My. & K. 655, a daughter conveyed her remainder in fee in an estate to her father, who was tenant for life, subject to a mortgage, in consideration of his entering into a covenant to indemnify her against the mortgage, and in consideration of 3000*l.* advanced, or agreed to be advanced or secured to her, in contemplation of her intended marriage, *upon the terms expressed in a bond bearing even date therewith*. On the indenture of release was indorsed a receipt signed by the daughter, as follows:—"Received, on the day and year first written, of and from the within-named J. P., *a bond for the sum of* 3000*l.*, *being the full consideration within expressed to be given by him*;" and the condition for making void the bond was, upon payment to his daughter and her intended husband of an annuity for their lives, and of 3000*l.* in certain events. Sir *J. Leach*, M. R., decided against the lien, observing that it was plain that it was not a case of a security, but a substitution for the price which the vendor had agreed to accept, and that the lien for the purchase-money was consequently discharged. This decision was affirmed by the Lords Commissioners, Sir *L. Shadwell* and Mr. Justice *Bosanquet*. Sir *L. Shadwell* thought that, although the appeal had been argued as if it were a naked case of vendor and purchaser, it appeared to be a sort of family arrangement between a father, daughter, and her intended husband, utterly inconsistent with the notion of a payment of purchase-money; and that it was obvious that the parties did not treat the consideration as a mere sum of 3000*l.*; that the receipt was for the bond, and not

for the 3000*l.*; and it appeared, therefore, that the parties were bargaining for a security, and not a stipulated sum, and consequently no lien arose, because the vendor had actually received the consideration.

So, likewise, in *Buckland* v. *Pocknell*, 13 Sim. 406, where A. agreed to sell an estate to B. for an annuity of 200*l.*, to be paid to him for his life, and an annuity of 92*l.*, to be paid after his decease to his son, and B. was to pay off a mortgage to which the estate was subject. Accordingly B. executed a deed, by which he granted the annuities to A. and his son, and covenanted to pay them; and by a conveyance of even date, but executed after the annuity deed, after reciting the annuity deed, A. and the mortgagee, in pursuance of the agreement, and in *consideration of the premises and of the annuities having been so granted as thereinbefore recited*, and of the payment of the mortgage-money, conveyed the estate to B. Upon the death of A., his son's annuity, which had been assigned to the plaintiff, became in arrear. Sir *L. Shadwell*, V.-C., held that there was no lien for the annuity. "The question," observes his Honor, "is whether it does not appear, on the face of the deeds, that the party who contracted to sell the land has got *that which he contracted to have*. Adverting to the mode in which the conveyances are made, my opinion is, that it would be quite wrong, because it would be contrary to what appears to have been the agreement of the parties, to hold, that, after the deeds were executed, any lien remained for the annuities. As there was a separate instrument, which was executed first, which contained a distinct grant of the two annuities, and covenants for payment of them; and *as the conveyance was made expressly in consideration of that deed*; and as it was part of the express stipulation that the mortgage-money should be paid off, and, consequently, that the mortgagee should convey his legal estate to the purchaser, it would be quite inconsistent with the mode in which the parties have dealt, to say that there is still an ulterior latent equity, for the purpose of securing the annuity in a manner in which neither party ever thought that it was to be secured; and it is evident that they did not think that it was to be so secured, from their having taken a specific security for it. In the case of *Parrott* v. *Sweetland*, which came before me and Mr. Justice *Bosanquet*, when we had the honour of being Commissioners of the Great Seal, we affirmed the judgment of Sir *J. Leach*, in a case where the course of the transaction showed that the party had got that for which he bargained."

So, likewise, in *Dixon* v. *Gayfere* (17 Beav. 421; 21 Beav. 118),

where the purchaser contracted to buy an estate from the vendor, and upon an assignment being made to grant to the vendor an annuity of 50*l.* per annum, during three lives, "*to be secured by bond*," Sir *John Romilly*, M. R., held, that the vendor had no lien on the estate for payment of the annuity. "The case of *Buckland* v. *Pocknell*," said his Honor, "appears to me to be very near the present. . . . It appears to me the mode of carrying the contract in the present case into effect is this:—By a separate and independent instrument the vendor should convey the land, and, in consideration of that conveyance, the purchaser should secure the annuity by his bond. . . . . This result does not appear to me to militate with the case of *Winter* v. *Lord Anson* (3 Russ. 483), nor do I dispute the authority of that case. In fact, both the cases of *Clarke* v. *Royle* (3 Sim. 499), and *Buckland* v. *Pocknell*, are distinguished from that; and one of the grounds on which the Vice-Chancellor of England went, in *Buckland* v. *Pocknell*, was, that it would be quite inconsistent with the mode in which the parties had dealt, to say that there should be a lien for the purchase-money during the lives of the annuitants." The decree of his Honor in this case was varied by Lord *Cranworth*, C., who, agreeing with his Honor that the vendor had no lien on the estate for payment of the annuity, held that he was entitled (the purchaser being dead and there having been no conveyance) to have the annuity secured by a valid and effectual bond before he could be called upon to convey the estate. 1 De G. & Jo. 655. See also *Dyke* v. *Rendall*, 2 De G. Mac. & G. 209; *Frail* v. *Ellis*, 16 Beav. 350; *Stuart* v. *Ferguson*, Hayes, Ir. Exch. Rep. 452.

Upon the same principle it has been held, that the vendor to a railway company in consideration of a rent-charge, has no lien for it if unpaid. See *Earl of Jersey* v. *Briton Ferry Floating Dock Co.*, 7 L. R. Eq. 409. There, by an agreement dated in 1851, a company, under powers conferred by the Lands Clauses Act, in consideration of the payment of a yearly rent-charge and royalties, agreed to purchase land for the construction of docks. It was agreed, by the 14th clause of the agreement, that "the above-mentioned rents and royalties should be *charged and secured by the conveyance*, according to the provisions of the 11th section of the Lands Clauses Consolidation Act, 1845." The company entered and completed the construction of the docks, but had not made any payment in respect of the rent-charge. It was held by Sir *W. M. James*, V.-C., upon the authority of *Winter* v. *Lord Anson*, 1 S. & S. 434, which he considered to be unaffected by Lord

Lyndhurst's decision, that the vendors were not entitled to a lien for the unpaid arrears of the rent-charge; and, after referring to Lord *Lyndhurst's* judgment (3 Russ. 488), his Honor observed, "Let us consider what the effect of these doctrines is, as applied to this case. A man conveys a piece of land for the construction of a public work, in consideration of an annual payment. It appears to me it would be quite contrary to the intention of the parties to suppose the vendor was reserving to himself a right, at some future time, to enter and destroy the public work, if the annual rent should fall into arrear. Hence, in my opinion, there is no lien in such a case for unpaid purchase-money. The question of receiver stands on a very different footing, but that question does not arise till the conveyance is settled."

See further as to remedies of the owner of a rent-charge against a railway company, *Eyton* v. *Denbigh, Ruthin, and Corwen Railway Company*, 6 L. R. Eq. 14.

From the foregoing cases we may conclude, that, although the mere giving of a bond, bill of exchange, promissory note, or covenant, for the purchase-money, or the granting of an annuity, secured by a bond or a covenant, will not be sufficient to discharge the equitable lien, yet where it appears that the note, bond, covenant, or annuity was *substituted* for the consideration-money, and was, in fact, the thing bargained for, the lien will be lost. See *In re Albert Life Assurance Company*, 11 L. R. Eq. 178.

An actual agreement, though by parol, to accept a security, and rely upon it alone, will, it seems, discharge the vendor's lien for unpaid purchase-money. See 1 S. & S. 445, where Sir *John Leach* observes, "That it is the vendor who in the first place attempts to raise an equity against the allegation of the deed; and if the vendor be permitted to repel the effect of the deed, by showing that the price was not paid, it must necessarily follow that the vendee must be at liberty to disclose the whole truth, and to explain the reason why that payment was not made."

Although the lien of a vendor for unpaid purchase-money may be discharged by his accepting the solicitors employed in the sale as his debtors in the place of the purchaser, on the supposition that the purchase-money had been paid to them, this was held not to be the case where in fact no payment of the purchase-money was made by the vendor to the solicitors, but they were simply directed by the purchaser to pay the purchase-money out of monies due by them to the purchaser on an unsettled account. See *Wrout* v. *Dawes*, 25 Beav. 369. See also *Wilson* v. *Keating*, 5 Jur. N. S. 815, 4 De G. & Jo. 588.

If a vendor, who knows the purchase-money is trust-money, suffers one of the trustees to retain part of it, without the knowledge of the co-trustees or the cestuis que trust, he has no lien on the estate for the part so retained: *White* v. *Wakefield*, 7 Sim. 401; and see *Price* v. *Blakemore*, 6 Beav. 507.

Upon the same principle in *Muir* v. *Jolly*, 26 Beav. 143, a trustee having purchased an estate on behalf of the trust, the vendor executed a conveyance to the trustee, which recited the trust, and that the trustee had called in trust-monies sufficient to pay the purchase-money, and it contained a receipt for the whole purchase-money. In fact, only a part was paid, and the trustee gave his bond and a memorandum of deposit for the deficiency, the latter reciting that the vendor had lent the trustee that sum to enable him to complete. It was held by Sir *John Romilly*, M. R., that the vendor had no lien on the title deeds in his possession for the unpaid purchase-money.

Where there was a stipulation that the purchase-money should be paid *within two years after a resale*, it was held that the vendor's lien was gone: *Ex parte Parkes*, 1 G. & J. 228.

It has been held, that, if a vendor take a totally distinct and independent security for the unpaid purchase-money, it will then become a case of substitution for the lien, instead of a credit given. Thus, in *Nairn* v. *Prowse*, 6 Ves. 752, Sir *William Grant*, M. R., held, that a vendor's equitable lien upon an estate, for the purchase-money, was lost by his taking, as a special security, a Long Annuity of 100*l.* a-year, by way of a pledge. "Suppose," said his Honor, "a mortgage was made upon another estate of the vendee, will equity, at the same time, give him what is in effect a mortgage upon the estate he sold; the obvious intention of burthening one estate being, that the other shall remain free and unencumbered? Though in that case the vendee would be a creditor, if the mortgage proved deficient, yet he would not be a creditor by lien upon the estate he had conveyed away. The same rule must hold with regard to any other pledge for the purchase-money. In this case the vendor trusts to no personal security of the vendee, but gets possession of a Long Annuity of 100*l.* a-year, which, according to the rise or fall of stock, might or might not be sufficient for the purchase-money. He has, therefore, an absolute security in his hands, not the personal security of the vendee. Could the vendee have any motive for parting with his stock, but to have the absolute dominion over the land?"

The case put by Sir *William Grant*, that a mortgage of another estate will be a substitution for

the lien, must, it seems, be qualified in the manner laid down by Lord *Eldon* in the principal case: as the question will be, whether, from the circumstances attending the mortgage, the intention of the vendor to give up the lien, can be clearly and satisfactorily implied. See *Cowell* v. *Simpson*, 16 Ves. 278; *Saunders* v. *Leslie*, 2 Ball & B. 515. But, where a bond was given for the unpaid purchase-money, and a mortgage *on part* of the purchased estate, the intention, that the lien should not extend over the rest of the estate, was held to be sufficiently clear: *Capper* v. *Spottiswoode*, Taml. 21. So, likewise, in *Bond* v. *Kent*, 2 Vern. 281, where the vendor took a mortgage of the estate for part of the purchase-money, and a note for the remainder, it was held that he had no lien for the money due on the note; "because," as observed by Lord *Redesdale*, in commenting on that case, "it was manifestly the intention of the parties that the amount of the note should not be a lien on the lands, else they would have had a mortgage for the whole; the seller took the estate for his debtor for part of the purchase-money, and was content with the note for the remaining part." See *Hughes* v. *Kearney*, 1 S. & L. 135; *Eyre* v. *Sadleir*, 14 Ir. Ch. Rep. 119, 15 *Ib.* 1.

In *Cood* v. *Pollard*, 9 Price, 514; 10 Price, 109, the purchaser, with the concurrence of the vendor, mortgaged the estate for a sum which the vendor received in part payment of the purchase-money, taking bills, which were ultimately dishonoured, for the remainder: it was held, that the vendor had no lien on the purchase-money arising from a second sale, in preference to the mortgagee.

Where the vendor, without receiving the purchase-money, executes a conveyance for the purpose of enabling the purchaser to execute a mortgage, he will lose his lien on the estate as against mortgagee: *Smith* v. *Evans*, 28 Beav. 59.

There will be no lien upon land in favour of a legatee, who has conveyed it away pursuant to the directions of a will, as a condition precedent to the receipt of the legacy, and which the executor (who had lost the assets of his testator) did not pay. See *Barker* v. *Barker*, 10 L. R. Eq. 438. There a testator gave a legacy to each of his daughters on condition that she should convey her share of certain real estate, to which the daughters were entitled, to the sons of the testator; and in case of any daughter refusing or being unable to comply with the condition, the legacy bequeathed to her was to be forfeited, and to form part of the testator's residuary personal estate. The testator gave his residuary personal

estate to his sons; and he appointed one of them, and two other persons, executors. The daughters conveyed their shares of their real estate to their brothers, but did not obtain payment of the legacies. It was held by Lord *Romilly*, M. R., that they were not entitled to any lien, in the nature of a vendor's lien, on the real estate conveyed by them for their legacies. "Unquestionably," said his Lordship, "they had an election in the first instance; they might have given up their legacies and retained the property, but till they conveyed it there was no right to the legacies. They did not then convey, making any terms as to the payment of the legacies, but they performed the condition, absolutely. They might unquestionably have done this—have bargained with their brothers that the legacies should remain a charge upon the shares until the legacies were paid; but there was no contract of that description: and the question, which is a somewhat novel one I think, and which was fully argued before me, is this: whether, on the construction of the will, this express condition that each daughter shall, at the request and costs of the sons, convey her estate, does create a charge upon the property conveyed. I think this is a mere personal obligation, and that it does not create a charge."

The vendor's lien is assignable even by parol (*Dryden* v. *Frost*, 3 My. & Cr. 640): but the assignee will take it subject to any prior incumbrances created by the vendor: *Lacey* v. *Ingle*, 2 Ph. 413; *Mangles* v. *Dixon*, 1 Mac. & G. 437, 3 Ho. Lo. Ca. 702; *Rayne* v. *Baker*, 1 Giff. 241; *Peto* v. *Hammond*, 29 Beav. 91.

A bequest of money due upon a vendor's lien is within the Mortmain Act (9 Geo. 2, c. 36), and therefore void as savouring of realty: *Harrison* v. *Harrison*, 1 Russ. & My. 71.

A judgment entered up against the vendor after a contract for sale, may, although execution cannot be levied upon it under the Judgment Act (18 & 19 Vict. c. 15), be enforced against the unpaid purchase-money: *Brown* v. *Perrott*, 4 Beav. 585.

Marshalling for Lien.—In the principal case, Lord *Eldon* expressed some doubt, although it was not necessary to decide the point, whether, on the death of the vendee, without having paid his purchase-money, a Court of equity would marshal his assets in favour of *third parties*, by allowing them, in case the vendor, having a lien on the real estate, should exhaust the personalty, to stand in his place on the real estate to the extent of his lien. In *Coppin* v. *Coppin*, Sel. Ch. Ca. 28, Lord *King* held, that the ordinary rule of marshalling would not apply to such a case; and in *Pollexfen* v.

Moore, 3 Atk. 273, Lord *Hardwicke* said, "That this equity (*i. e.* the lien for unpaid purchase-money) will not extend to a third person, but is confined to the vendor and vendee." It has, however, been repeatedly decided, overruling *Coppin* v. *Coppin*, and the dictum in *Pollexfen* v. *Moore*, that the lien of a vendor must be subjected to the ordinary rule of marshalling assets, and that, consequently, when the purchased estate *descends*, the estate and personal assets will, as against the heir, be marshalled in favour of simple contract creditors and legatees (*Trimmer* v. *Bayne*, 9 Ves. 209; *Sproule* v. *Prior*, 8 Sim. 189); and where the purchased estate is *devised*, as against the devisees, in favour of simple contract creditors (*Selby* v. *Selby*, 4 Russ. 336; *Emuss* v. *Smith*, 2 De G. & Sm. 722), but not in favour of legatees (*Wythe* v. *Henniker*, 2 My. & K. 635; but see *Birds* v. *Askey*, 24 Beav. 618, 621; *Lord Lilford* v. *Powys-Keck*, 1 L. R. Eq. 347; *Hensman* v. *Fryer*, 2 L. R. Eq. 627; reversed, 3 L. R. Ch. App. 420; *Gibbons* v. *Eyden*, 7 L. R. Eq. 371; *Dugdale* v. *Dugdale*, 14 L. R. Eq. 234; but now, freehold and copyhold estates are, under the Act for payment of creditors by simple contract (3 & 4 Will. 4, c. 104), assets for the payment of debts by simple contract, in all cases coming within the operation of the statute, the doctrine of marshalling is inapplicable and such debts will be satisfied when necessary out of those estates.

The doctrine of marshalling will form the subject of another note, and is only mentioned here on account of the doubt thrown out by Lord *Eldon* in the principal case, as to its being extended to the vendor's lien for unpaid purchase-money.

Estate in the hands of Third Parties when Bound by the Vendor's Lien.]—The equitable lien for unpaid purchase-money will, as is laid down in *Mackreth* v. *Symmons*, bind the estate not only in the hands of the purchaser and his heirs, and persons taking from them as volunteers, but also in the hands of purchasers for valuable consideration, who bought with notice that the purchase-money remained unpaid (*Hearle* v. *Botelers*, Cary's Ch. Rep. 35; *Walker* v. *Preswick*, 2 Ves. 622; *Hughes* v. *Kearney*, 1 S. & L. 135; *Winter* v. *Lord Anson*, 3 Russ. 488; *S. C.*, 1 S. & S. 434; *Frail* v. *Ellis*, 16 Beav. 350, 354); but the lien will not prevail against a bonâ fide purchaser who bought without notice that the purchase-money remained unpaid (*Cator* v. *Earl of Pembroke*, 1 Bro. C. C. 302); and, although the title is deduced from the first vendor, in recital, still that will not be sufficient to affect the purchaser with notice, if the recital does not show that the estate was not paid for:

Cator v. *Earl of Pembroke*, 1 Bro. C. C. 302; *Eyre* v. *Sadlier*, 14 Ir. Ch. Rep. 119; 15 *Ib.* 1. See, however, *Davies* v. *Thomas*, 2 Y. & C. Exch. Ca. 234: in which case a reference, in the conveyance of the second purchasers to the will under which the sale was made, was held to be sufficient notice of a lien not appearing upon the face of the will, upon the ground that notice of the will ought to have put the purchasers upon inquiries which would have led to the discovery of the lien. The authority of this case, as to what is to be deemed sufficient notice, seems doubtful. See Sugd. V. & P. 819, 11th ed.

The fact of the vendor remaining in possession of the estate as lessee, where he has acknowledged the receipt of the purchase-money in the body of the deed and by indorsement will not be notice of the purchase-money remaining unpaid, so as to cause the lien to attach: *White* v. *Wakefield*, 7 Sim. 401.

But if the vendor claiming a lien retains the conveyance and the title-deeds, a subsequent purchaser or mortgagee (although he may have acquired the legal estate) may be affected with notice of the lien, and therefore bound by it where the Court imputes to him fraud, or gross and wilful negligence, for omitting all inquiries as to the deeds: *Worthington* v. *Morgan*, 16 Sim. 547; *Peto* v. *Hammond*, 30 Beav. 495; and see *Hewitt* v. *Loosemore*, 9 Hare, 449; *Finch* v. *Shaw*, *Collyer* v. *Finch*, 19 Beav. 500; 5 Ho. Lo. Ca. 905.

If the legal estate is outstanding, then, as the second purchaser has only an equitable interest, subsequent to that of the equitable lien, the maxim, "Qui prior est tempore potior est jure," may, as in the principal case, apply; and the equitable lien will have precedence; *Frere* v. *Moore*, 8 Pri. 475.

Where, however, the equity of a second purchaser or mortgagee having only an equitable interest is better than that of the vendor claiming a lien for unpaid purchase-money, such purchaser or mortgagee will be entitled to priority over the lien.

This subject has been much discussed in the important and leading case of *Rice* v. *Rice*, 2 Drew. 73. There certain leasehold property was assigned to a purchaser, *by a deed which recited the payment of the whole purchase-money, and had the usual receipt indorsed on it*, and the *title-deeds were delivered up to the purchaser.* Some of the vendors received no part of their share of the purchase-money, having allowed the payment to stand over for a few days, on the promise of the purchaser then to pay. The day after the execution of the deed, the purchaser deposited the assignment and title-deeds with the defendants, with a memorandum of

deposit to secure an advance, and then absconding, without paying either the vendors or the equitable mortgagees. It was held by Sir *R. T. Kindersley*, V.-C., that the defendants, the equitable mortgagees, having the better equity, were entitled to payment out of the estate in priority to the claim of the vendors for their lien. "In a contest," said his Honor, "between persons having only equitable interests, priority of time is the ground of preference *last resorted to; i. e.*, a Court of equity will not prefer the one to the other, on the mere ground of priority of time, until it finds, upon an examination of the relative merits, that there is no other sufficient ground of preference between them; or, in other words, that their equities are *in all other respects equal;* and that if one has, on other grounds, a better equity than the other, priority of time is immaterial. . . . . So far as relates to the nature and quality of the two equitable interests, abstractedly considered, they seem to me to stand on an equal footing; and this I conceive to have been the ground of Lord *Eldon's* decision in *Mackreth* v. *Symmons*, where, in a contest between the vendor's lien for unpaid purchase-money, and the right of a person who had subsequently obtained from the purchasers a mere contract for a mortgage, and nothing more, he decided in favour of the former, as being prior in point of time . . . . . If, then, the vendor's lien for unpaid purchase-money, and the right of an equitable mortgagee by mere contract for a mortgage, are equitable interests of equal worth in respect of their abstract nature and quality, is there anything in the special circumstances of the present case to give to the one a better equity than the other? One special circumstance that occurs is this, that the equitable mortgagee has the possession of the title-deeds." . . . . . And his Honor, after referring to *Foster* v. *Blackstone* (1 My. & K. 307); *Stanhope* v. *Verney* (Butler's Co. Litt. 290 b, note (1), sect. 15; 2 Eden, 81); 3 Sugd. V. & P. 218; and *Maundrell* v. *Maundrell* (10 Ves. 271), adds: "We have here ample authority for the proposition, or rule of equity, that as between two persons whose equitable interests are precisely of the same nature and quality, and in that respect precisely equal, the possession of the deeds gives the better equity. And applying this rule to the present case, it appears to me that the equitable interests of the two parties being, in their nature and quality, of equal worth, the defendant, having possession of the deeds, has the better equity; and that there is, therefore, in this case, no room for the application of the maxim, 'Qui prior est tempore potior est jure,' which is only applicable where the equities

of the two parties are, in all other respects, equal. I feel all the more confidence in arriving at this conclusion, inasmuch as it is in accordance with the opinion expressed by Lord *St. Leonards* in his work on Vendors and Purchasers. And I have no doubt, that in *Mackreth* v. *Symmons*, if the equitable mortgagee had, in addition to his contract for a mortgage, obtained the title-deeds from his mortgagor, Lord *Eldon* would have decided in his favour." And his Honor, after guarding against the supposition that he meant to express an opinion that the possession of the title-deeds would, in all cases, and under all circumstances, give the better equity, and after referring to *Allen* v. *Knight* (5 Hare, 272, 11 Jur. 527), says: "It appears to me that in all cases of contest between persons having equitable interests, *the conduct of the parties, and all the circumstances*, must be taken into consideration, in order to determine which has the better equity. And if we take that course in the present case, everything seems in favour of the defendant, the equitable mortgagee. The vendors, when they sold the estate, chose to leave part of the purchase-money unpaid, and yet executed and delivered to the purchaser a conveyance by which they declared, in the most solemn and deliberate manner, both in the body, and by a receipt indorsed, that the whole purchase-money had been duly paid. They might still have required that the title-deeds should remain in their custody with a memorandum, by way of equitable mortgage, as a security for the unpaid purchase-money; and if they had done so, they would have been secure against any subsequent equitable incumbrance; but that they did not choose to do, and the deeds were delivered to the purchaser. Thus they voluntarily armed the purchaser with the means of dealing with the estate as the absolute, legal, and equitable owner, free from every shadow of incumbrance or adverse equity. In truth, it cannot be said that the purchaser, in mortgaging the estate by the deposit of the deeds, has done the vendors any wrong, for he has only done that which the vendors authorised and enabled him to do. The defendant who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's title. They had in effect, by their acts, assured the mortgagee that, as far as they (the vendors) were concerned, the mortgagor had an absolute indefeasible title both at law and in equity." See also, *Wilson* v. *Keating*, 4 De G. & Jo. 588.

A person taking a conveyance with notice of a purchaser's lien for unpaid purchase-money, would, it seems, take subject to it. Thus, if a man sell an estate to B., and receive part of the purchase-money, and then repudiate the

contract and sell the estate to C., who has notice of the first contract and the payment of part of the purchase-money by B., B. will, in that case, have a lien on the estate in the hands of C. for the money paid to the original owner (see 29 Beav. 254); but semble that if the property the subject of the contract were situated abroad, no decree enforcing the lien would be made, at any rate in the absence of any special circumstances: *Morris* v. *Chambres*, 29 Beav. 246; see also, *Watson* v. *Rose*, 10 W. K. (V.-C.K.) 745; *S. C.*, nom. *Rose* v. *Watson*, 10 H. L. Ca. 672.

The assignees of a bankrupt will be effected by the equitable lien, although they may have had no notice of it; for it is a clear principle that assignees in bankruptcy take subject to all the equities attaching to the bankrupt: *Bowles* v. *Rogers*, 6 Ves. 95, cited in note (*a*); *Ex parte Hanson*, 12 Ves. 349; *Mitford* v. *Mitford*, 9 Ves. 99; *Grant* v. *Mills*, 2 V. & B. 306; *Ex parte Peake*, 1 Madd. 346. So, also, will the assignees under a general assignment for the benefit of creditors: *Fawell* v. *Heelis*, Amb. 724; and see 1 Bro. C. C. 302.

Where a vendor took a security for his purchase-money, as, for instance, a bond, he was not permitted to sue at law on the bond and in equity to enforce the lien at the same time, but was compelled to elect in which court he would proceed: *Barker* v. *Smark*, 3 Beav. 64.

A vendor's lien for unpaid purchase-money not being an express trust, his right to recover it may be barred by the 40th section of the Statute of Limitations, 3 & 4 Will. 4, c. 27, after twenty years from the day fixed for payment (*Toft* v. *Stephenson*, 7 Hare, 1); but a case may be taken out of the operation of the statute by a sufficient acknowledgment (*S. C.*, 1 De G. Mac. & G. 28; 5 De G. Mac. & G. 735); and thereupon, payment of the purchase-money remaining unpaid, and arrears of interest may be enforced in equity: *Ib.*

But by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), which comes into operation on the 1st of January, 1879, the right to recover may be barred at the end of twelve years, sec. 8.

The vendor's lien for unpaid purchase-money was held not to be a "charge by way of mortgage" within the meaning of "Locke King's Act" (17 & 18 Vict. c. 113); hence the personal estate of the deceased purchaser, notwithstanding that act, remained primarily liable for its payment: *Hood* v. *Hood*, 5 W. R. (N. S.) 747; 3 Jur. (N. S.) 684, and *Barnewell* v. *Iremonger*, 1 Drew. & Sm. 255, but now, by 30 & 31 Vict. c. 69, the word "mortgage," in the construction of these statutes, has been extended to any lien for unpaid purchase-money upon any

lands or hereditaments purchased by a *testator*.

As the enlarged meaning of the word "mortgage" is only given in the case of lands purchased by a *testator*, when lands have been purchased by an *intestate*, his personal estate will remain primarily liable to discharge the lien for unpaid purchase-money. *Harding* v. *Harding*, 13 L. R. Eq. 493; *Hudson* v. *Cook*, 26 L. T. Rep. (N. S.) 181, overruling *Evans* v. *Poole*, 49 L. T. (N. S.) 50.

Vendee's Lien for prematurely paid Purchase-Money.] — If the purchase-money, or part of it, has by way of deposit or otherwise, been paid prematurely, before a conveyance, and the contract has been rescinded, or cannot be enforced through want of title or other default of the vendor, the vendee will have a lien upon the estate in the hands of the vendor, even it seems although he may have taken a *security* for his money. This doctrine has been laid down in various cases, and it has been the subject of great consideration in the leading case of *Wythes* v. *Lee*, 3 Drew. 396: there the defendant, a mortgagee, who held the mortgage, as to the greater part, in trust for several persons; as to a part, as mortgagee for himself, selling under a power of sale, contracted to sell the mortgaged estate for 380,000*l*., and the plaintiff paid 38,000*l*., part of the purchase-money, by way of deposit. A bill having been filed by the purchaser, claiming a lien on the estate for his deposit, a demurrer to the bill was overruled by Sir *R. T. Kindersley*, V.-C. "The point," said his Honor, "most discussed, and the most important, is this abstract question. Suppose a person, absolute beneficial owner in fee of an estate, contracts to sell it, and the purchaser pays a deposit in part payment of the purchase-money, and by reason of the vendor being unable to make a title, or from any other reason, not being misconduct on either side, the contract goes off, and cannot be completed; has the purchaser a lien on the estate for his deposit? That is the most important question. If there is a right of lien, as that is a right in equity, it follows that it must be capable of being enforced by bill.

"Now, that question I have looked at in three different points of view:—1. With reference to natural justice, irrespectively of any specific rule of law; and it does appear to me that it is consistent with natural justice, that if a purchaser, on the faith of the contract being completed, and the estate becoming his, has advanced money in payment, or part payment, for the purchase, he has advanced it under circumstances which entitle him to say, 'If you cannot complete, not only are you bound to give me back my money, but I have a right to a lien on the

estate.' 2. With reference to the general law of this Court, I do not mean with reference to decided cases, but to the general law and principles of this Court. This is clear, that the *vendor*, if he has parted with the estate to the purchaser before he has got his money, has a lien for it on the estate; that is unquestionable. Now, does the right of the *purchaser*, if the contract goes off, stand in principle on the same footing as that of the vendor? The only distinction that occurs to me is this:—the vendor, when he contracts to sell his estate, is owner; he has the estate in his own possession, at least under his own control; and when he contracts to sell, his right is to say, 'I will convey the estate when the purchase-money is paid, but till that is done, I will not convey it.' That right creates a lien of itself, very analogous to the common law lien; and that lien, which exists before conveyance, still continues; it is not a new, but the same lien. But with regard to the purchaser, he has not the estate in his possession, and his lien is not in its origin the same sort of lien as that of the vendor. But when a contract is made and then goes off, it appears to me, that, in principle and justice, the equity of the purchaser to a lien on the estate ought to stand on as good a footing as the lien of the vendor after conveyance. A difficulty has been suggested, that with regard to a vendor, by taking an additional security for the purchase-money, as a general rule, he loses his right to his lien, and a purchaser does not. The ground of the distinction I am at a loss to understand. But, however that may be, it appears to me that, on principles of equity and justice, the purchaser, when the contract goes off, has a lien." His Honor then examining this subject in a third point of view, viz., as to the authorities, after noticing the dictum in *Burgess* v. *Wheate*, referred to in the principal case (*ante*, p. 336); and the opinion of Lord *St. Leonards*, in his work on Vendors and Purchasers (see vol. ii. p. 857, 11th ed.), and observing, that "there is no single case in which any such claim has been made by a purchaser," added: "But I do not see any inconvenience in establishing the rule; I do not see any hardship in it. It is true, that in some cases the Court has refused to order the deposit to be returned; but those have all been cases in which the bill was for other purposes, and the return of the deposit was collateral. I do not see what mischief could result from entertaining a bill for the single purpose of establishing the right to a lien for the deposit; and, if it were necessary for me now to determine the question of the right to a lien, I should feel great difficulty in getting over the authorities on the subject, the dictum in *Burgess* v. *Wheate*, the observations of Lord *Eldon* in *Mackreth* v. *Symmons*, and the

opinion of Lord *St. Leonards*, especially as I think natural justice is strongly in favour of the doctrine." But his Honor did not decide whether, in the peculiar circumstances of the case, the vendee would have a lien for the purchase-money as against the mortgagor or the persons for whom the mortgagee was trustee.

The vendee's lien extends also to interest on his purchase-money (*Torrance* v. *Bolton*, 14 L. R. Eq. 124, 136; 8 L. R. Ch. App. 118) and costs of suit (*Ib.*; and see *Middleton* v. *Magnay*, 2 H. & M. 233; *Turner* v. *Marriatt*, 3 L. R. Eq. 744; *Thomas* v. *Buxton*, 8 L. R. Eq. 120).

Upon the same principle, a person who pursuant to an agreement expends money upon property agreed to be leased to him, and which the proposed lessor agrees to repay on his failure to grant a lease, will have a lien on the interest of the proposed lessor in the property, upon his being unable to grant a lease for want of title: *Middleton* v. *Magnay*, 2 H. & M. 233.

The vendee will have a lien for prematurely paid purchase-money not only as against the vendor, but as against a subsequent mortgagee who had notice of the payments having been made: (*Watson* v. *Rose*, 10 W. R. (V.-C. K.), 755, *S. C.*, nom. *Rose* v. *Watson*, 10 H. L. Ca. 672,) even although some of the payments are in pursuance of the contract made after the mortgage, at any rate if the mortgagee gives no notice of any intention to interfere with the contract.—*Ib.*

It seems, however, that where a purchaser prematurely pays part of the purchase-money to a mortgagee selling under a power of sale, he would have a lien upon the interest of the mortgagee. "There is," said *Kindersley*, V.-C., "certainly a ground of equity for that; for though that which was the subject of sale was a fee-simple, there is justice in saying if the vendor is entitled to some lesser interest, to the extent of that interest, the purchaser is entitled to the lien." See *Wythes* v. *Lee*, 3 Drew. 406; *Burgess* v. *Wheate*, 1 Eden, 211; *Lacon* v. *Mertins*, 3 Atk. 1; *Oxenham* v. *Esdaile*, 2 Y. & J. 493; 3 Y. & J. 262.

In the event of a sale by the first purchaser of an estate having a lien upon it for prematurely paid purchase-money, the second purchaser who has also paid his *purchase-money* or part of it prematurely will, in case the first purchase is rescinded, have a lien upon the sum in respect of which the first purchaser had a lien upon the estate. See *Aberaman Iron Works* v. *Wickens*, 4 L. R. Ch. App. 101. There Bailey, the owner of an estate, agreed to sell it to Wickens for 250,000*l.*, representing it to contain 1,530 acres. Wickens paid Bailey 50,000*l.*, part of the purchase-money. Wickens agreed to sell the Aberaman estate to the Aberaman Iron Works Company

for 350,000*l.*, of which 150,000*l.* was paid to him, 75,000*l.* in cash, and bonds for 75,000*l.* Wickens having brought an action against Bailey (in consequence of the estate containing 430 acres less than it was represented to contain), the action was compromised by Bailey repaying the 50,000*l.*, 25,000*l.* in cash and 25,000*l.* in bills of 5000*l.* each, and by the agreement being abandoned. The company then filed a bill against Wickens for a return of the 75,000*l.* and the bonds. Wickens received the proceeds of four of the bills of exchange for 5000*l.*; but the fifth bill for 5000*l.* remaining unpaid, the proceeds were brought into Court in the suit. It was held by Lord *Cairns*, L. C., reversing the decision of Sir *R. Malins*, V.-C. (reported 5 L. R. Eq. 485), that the company were entitled to repayment of what they had paid, and to a return of the bonds, and that they had a lien on that portion of the 50,000*l.* repaid to the purchaser which had been paid into Court. "Adverting," said his lordship, "to the demand which is made on the part of the plaintiffs for a lien in respect of the purchase-money which has been paid, that question stands thus:— 50,000*l.* was paid by Wickens to Bailey on account of the purchase of the estate. According to the decisions which were referred to— the case of *Wythes* v. *Lee* (3 Drew. 396) and the case of *Rose* v. *Watson* (10 Ho. Lo. C. 672), Wickens, in the event of the purchase going off, would have a lien for this 50,000*l.* upon the Aberaman estate belonging to Bailey. In like manner the company in their turn, for the purchase-money which they paid Wickens, would, in the event of their contract going off, have lien upon any interest which Wickens might possess in the Aberaman estate; and, according to the decisions to which I have referred, Wickens to the extent of the 50,000*l.* he paid, had become the owner, by way of incumbrance, of a corresponding amount in value on the Aberaman estate. It appears to me, therefore, upon the authority of those decisions, to be clear that the company, supposing the 50,000*l.* had not been repaid by Bailey to Wickens, would have been entitled to maintain a bill against Wickens and Bailey to prevent the money getting back into the hands of Wickens. In point of fact, when the bill was filed, the 50,000*l.* had, in part, been repaid to Wickens; but part of the amount remained in *specie* in the form of a bill of exchange of Bailey's, which had not been paid. This bill of exchange was intercepted by the injunction of the Court: and, in respect of it, I find 6,232*l.* is now in court. Upon that sum it appears to me the plaintiffs in this suit have established their right to a lien. The decree of the Vice Chancellor, therefore, must, in my opinion, be reversed; and a decree must be made directing an account of the

purchase-money paid by the company to Wickens, and repayment of it with interest at 4*l.* per cent. from the time of payment. A time must be fixed for that repayment. The bonds remaining in the possession of Wickens must be delivered up; and he must be ordered to concur in the delivery up of some which are with the London and County Bank."

Where it turns out that another person is, under the contract of sale, entitled to the estate, the person taking the conveyance to himself, or his assignees, will have a lien for the purchase-money that he has paid. See *Neesom* v. *Clarkson*, 4 Hare, 97. There a man contracted to purchase an estate in fee simple, but died before he had paid the money, having devised and bequeathed all his property to his widow. The widow married again, and her husband, supposing himself to be entitled, paid the purchase-money under the contract. He then mortgaged the estate, and afterwards conveyed it absolutely to purchasers, in whose purchase deed there were recitals showing that the second husband was only entitled to an interest in the estate jure uxoris, save in respect of the lien he had upon it by having paid the purchase-money. The widow died without any issue of the marriage with her second husband, and afterward her second husband, the heir-at-law of the widow, having filed a bill for the redemption of the property, it was held by *Wigram*, V.-C., that the recitals in the purchase deed gave distinct notice to the purchasers from the second husband, that all his interest ceased upon the death of his wife, and that all the purchasers from the second husband were entitled to was a lien in respect of the purchase-money paid by the second husband, and the moneys expended in lasting improvements from the date of the purchase, with interest. In other respects the purchasers were treated as mortgagees in possession, and were debited with rents received, or which might, but for *wilful default*, have been received during the same period. See also *Parkinson* v. *Hanbury*, 2 L. R. Ho. Lo. 1; *Maddison* v. *Chapman*, 1 J. & H. 470.

The lien of the vendee for prematurely paid purchase-money will not exist where he has by his own default abandoned the contract (*Dinn* v. *Grant*, 5 De G. & Sm. 451; *Ex parte Barrell, In re Parnell*, 10 L. R. Ch. App. 512). nor where the contract is by statute illegal (*Ewing* v. *Osbaldiston*, 2 My. & Cr. 88), nor where the purchaser is by law disqualified from holding real estate (*Harrison* v. *Southcote*, 2 Ves. 389, 393). *Secus*, if the purchaser repudiates the contract where the vendor cannot make a good title, or where the sale constitutes a breach of trust (*Wythes* v. *Lee*, 3 Drew. 396).

NOYS *v.* MORDAUNT.

De Term. S. Hil., Feb. 4th, 1706.

[REPORTED 2 VERN. 581.]

ELECTION.]—*A. having two daughters, B. and C., devises fee-simple lands to B., and lands which were settled upon him in tail to C. If B. will claim a share of the entailed lands under the settlement, she must quit the fee-simple lands; for the testator having disposed of the whole of his estate amongst his children, what he gave them was upon the implied condition they should release to each other.*

S. C., Eq. Ca. Ab. 273, pl. 3; Prec. Ch. 265; Gilb. Eq. Rep. 2.

JOHN EVERARD, having two daughters, in 1686 makes his will, and devises to Margaret, his eldest daughter, his lands in Beeston, and 800*l.* in money; to Mary, his second daughter, his lands in Stanborn and Broom, and 1300*l.* in money, provided and on condition she released, conveyed, and assured Beeston lands to her sister Margaret; and devised to his said second daughter 1300*l.* in money (*a*). Provided, if he should have a son, what was devised to his daughters to be void; and in such case gave to Margaret 1200*l.*, and to Mary 1000*l.* Provided, if he should have another daughter, then he gave the 800*l.* devised to Margaret to such after-born daughter; and the lands at Stanborn and Broom, and the 1300*l.* devised to Mary, the second daughter, to the said Mary and such after-born daughter, equally between them.

(*a*) This last bequest of £1300 in money seems to be a repetition of the first bequest of that sum with the lands in Stanborn and Broom.

He shortly afterwards died, and left his wife enceinte of a daughter, Elizabeth. Mary married Higgs, and died without issue, not having given any release to Margaret, her sister, according to the will.

Elizabeth claimed not only the lands devised to her by

the will, and a moiety of what was devised to her sister Mary, but also a moiety of the Beeston lands, devised to Margaret: the same, on the testator's marriage, being settled on himself for life, and his wife for her jointure, and to the first and other sons, and, in default of issue male, to the heirs of his body.

Question was, whether she should be at liberty so to do, or ought not to acquiesce in the will, or renounce any benefit thereby.

Lord Keeper Cowper.—In all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee-simple lands, and to another lands entailed or under settlement (*a*), it is upon an *implied condition* that each party acquit and release the other; especially as in this case, where, plainly, he had the distribution of his whole estate under his consideration, and has given much more to Elizabeth than what belonged to her by the settlement, and had it in his power to cut off the entail.

(*a*) That is to say, entailed or settled upon the one to whom the fee-simple lands are given, or upon such one jointly with the other.

STREATFIELD *v.* STREATFIELD.

De Term. S. Hil., 1735.

[REPORTED CAS. TEMP. TALB. 176.]

ELECTION.]—*The ancestor, by articles previous to his marriage, agrees to settle certain lands to the use of himself and his intended wife, remainder to the issue of the marriage in the usual manner. After marriage he makes a deed, not pursuant to the articles, and has a son and two daughters; and upon the marriage of his son, settles other lands, in consideration of this last marriage, in the usual manner, and levies a fine of the former lands to the use of himself in fee; and then makes his will, and devises part of the former lands to his two daughters, and the rest of his real estate to trustees, to the use of his grandson for life, with usual remainders; and with direction, out of the profits to educate the grandson, and to place out the rest of the profits to be paid to the grandson at twenty-one years of age; and if he does not attain that age, to be paid to his said daughters, their executors, &c. The grandson is not to be bound by the deed, which did not pursue the articles, but then he shall make his election when he comes of age, and if he chooses to take lands which ought to have been settled, the daughters (his aunts) shall be reprised out of the lands devised to him.*

THOMAS STREATFIELD, the plaintiff's grandfather, by articles previous to his marriage, May 31st, 1677, agreed to settle lands in Sevenoake [in the county of Kent] to the use of himself and Martha, his intended wife, for their lives and the life of the survivor; and after the survivor's decease, to the use of the heirs of the body of him the said Thomas on his wife begotten, with other remainders over.

The marriage soon after took effect, and by deed, dated April 5th, 1698, reciting the foresaid articles, he settled his lands at Sevenoake to the use of himself and his wife for their lives, and the life of the longest liver of them without impeachment of waste during the life of Thomas, and after their decease, to the use of the heirs of the body of the said Thomas, on the said Martha to be begotten; and for want of such issue, remainder to the right heirs of Thomas. They had issue, Thomas (their only son), and two daughters, Margaret and Martha.

In the year 1716, upon the marriage of Thomas, the son, the father settled other lands (of which he was seised in fee), of the yearly value of 355*l.*, to the use of his son for life, remainder to the daughters of the marriage, remainder in fee to the son, with a power to raise 2000*l.* for younger children.

After the son's death [leaving a son called Thomas], Thomas, the father, in the year 1723, levied a fine of the lands comprised in the deed of 1698 to the use of himself in fee, and in the year 1725 made his will, and thereby devised part of those lands (*a*) to his two daughters, Margaret and Martha; "And also all other his manors, messuages, lands, tenements, and hereditaments whatsoever, either in possession, reversion, or remainder, not thereinbefore given or disposed of, situate in the counties of Kent, Surrey, or elsewhere, to trustees in trust for the plaintiff Thomas, his grandson, for life; remainder to his first and other sons in tail male; remainder to his daughters in tail; remainder to Margaret and Martha, with several remainders over." Then comes this clause: "And my will and meaning farther is, and I do hereby authorise and appoint the trustees, and the survivor of them, to receive the rents and profits of the said estates to them devised, and out of the same to allow and expend, for the education of my grandson Thomas, so much as they shall think fit during his minority; and that the trustees shall place out at interest such monies arising out of the rents and profits of the said estates; which said monies, with interest arising therefrom, my will is

(*a*) *i.e.*, viz. the lands at Sevenoake in Kent.

be paid to my grandson Thomas at his age of twenty-one years, if he so long live; or, in case he dies before that age, then that the same shall be paid to my two daughters, Margaret and Martha, their executors, &c."

The testator died in the year 1730.

The question was, whether the settlement in 1698 was a proper execution of the articles of 1677? and if not, whether the general devise to the plaintiff should be taken as a satisfaction for what he was entitled to under the articles of 1677?

Mr. Solicitor-General, Mr. *Browne*, Mr. *Fazakerley*, and Mr. *Noel* argued, for the plaintiff, that, although in a will or articles executed, Thomas the grandfather would have been tenant in tail, yet the articles of 1677 being but executory, this Court would interpose, by carrying them into execution in the strictest manner, and not leaving it in his power to destroy the uses as soon as raised. That, according to that rule, the deed of 1698 was certainly no execution of the articles in equity; for, though it was in the very words, yet did it not at all answer the intent of the articles, and came, therefore, within the rules of *Trevor* and *Trevor's case*, 1 Eq. Ca. Abr. 387 (*a*).

(*a*) 1 P. Wms. 622, *S.C.*

That the settlement in 1716, upon Thomas the son's marriage (although it was of lands of greater value than those contained in the articles), could never be thought a satisfaction for them, there being no reference at all in it to the articles, and it being made only in consideration of the son's marriage, and for settling a jointure upon his wife, and making a competent provision for the issue; all which are new considerations, no way relative to the articles: and where there is an express consideration mentioned in a deed, there can be no averment of another not contained therein (*b*).

(*b*) Dyer, 146, *b.* 71.

That nothing could be taken for a satisfaction but what was in its nature agreeable to the thing which was to be done, was held in *Lechmere* and *Lady Lechmere's case* (*c*). But, in this case, Thomas the son was, by the articles, to have been tenant in tail; but, by the settlement in 1716, he was to be but tenant for life: which was giving him a

(*c*) *Lechmere* v. *Lechmere*, Ca. t. Talb. 80; *S.C.* 3 P. Wms. 211.

less estate for a greater, and consequently not to be deemed a satisfaction without a special acceptance of it as such, according to the rule in *Pinnel's case*, 5 Co. 117, where it is held that payment of a lesser sum can never be a satisfaction for a greater, unless upon a special circumstance showing the intent, as payment at an earlier day, &c. That the will could no more be taken for a satisfaction than the settlement, and upon the same reasons; for, by it, the plaintiff is no more than tenant for life, and even that not absolutely, the profits being directed by the testator to be accumulated until the plaintiff attains his age of twenty-one, and then to be paid to him; but if he dies before that age, they are given away to the testator's daughters; and when he does arrive at that age, he is to be but barely tenant for life, and even not that without impeachment of waste; besides, if the will be construed a satisfaction, as against the plaintiff, so it must likewise be as to all the others claiming under the articles; whereas, the plaintiff's sisters, who were entitled under the articles, can never take anything under this will, but are wholly excluded.

The general devise of all his manors, lands, &c., *in possession, reversion, or remainder*, will not alter the case; for where the testator hath estate sufficient to satisfy such general words, he shall never be construed to have intended to pass that which he had no right to dispose of, and the giving of which would work a wrong. That he had no right to dispose of the lands contained in the articles, is evident from what hath been already said; and had not this been upon his own marriage, but in any other settlement, he had been a trustee for his son, and then had made his will in the same words that he hath done here, surely that trust estate would never have passed; and there is no difference, whether the trust be expressed, or whether it arises by implication of equity. It would be an absurdity to construe these words to pass away a third person's estate. *A grant of all one's goods* will not pass those which he hath in auter droit: So, if he had had a mortgage in fee, such general words would

not have passed it from the devisee of the personal estate to the devisee of the land. In *Rose and Bartlett's case*, Cro. Car. 292, a general devise of *all his lands and tenements*, having both freehold and leasehold, was held to pass the freehold lands only (*a*). And, in *Harwood and Child's case*, heard by the present Lord Chancellor, March 18, 1734, a devise of all his lands for payment of debts, having both freehold and copyhold, but no surrender made of the copyhold to the use of his will, was held not to pass the copyhold. Nor can the cases of *Duffield* v. *Smith*, 2 Vern. 258; *Noys* v. *Mordaunt*, 2 Vern. 581; be objected: for, in the former, the decree was reversed, upon account of the sister's being heir-at-law, and disinherited, which is the present case; (for here they would take a beneficial interest from the plaintiff, who was heir-at-law to his grandfather, and give him but a very small one in its room;) and, in the latter case, the father, being tenant in tail of part, had power to bar it by fine; in which respect he might well be looked upon as a proprietor of the whole; but, if he be decreed to make his election, it must be done presently, for then it is that he is to take; whereas, he cannot by law make his election, being but an infant; and if so, the Court must compel him to that which the law disables him from doing.

(*a*) See now, 1 Vict. c. 26, s. 6.

Mr. Attorney-General, Mr. *Strange*, and Mr. *Peere Williams*, argued for the defendant, that this Court will not, in all cases whatever, decree a specific performance; but would, in some particular cases, leave the party to his remedy at law upon the covenant; that these articles were made so long ago as in 1677, and Thomas, the son, who was the person entitled to have them carried into execution, lived until 1722, forty-five years after, without ever desiring to have them executed; and that the intent of those articles did not seem to go any further than the settling the jointure on the wife, and the making Thomas, the grandfather, tenant in tail, the words being *to provide for the wife*, but no mention made of the issue; but, *who-*

ever comes into equity must do equity; and, therefore, if the plaintiff would take advantage of those articles, he must make a compensation for it out of the will, which gives him an estate upon a plain supposal that he shall take nothing by the articles; but shall never be at liberty to take a great benefit under the will, and waive that part which makes against him to the prejudice of a third person. The whole will must be acquiesced under, or no part of it at all, according to the resolution in *Noys and Mordaunt's case* (*a*); which went upon the reason of an entire compliance with the testator's intent in taking entirely under the will, and not upon the supposed reason of his being proprietor by having it in his power to levy a fine. The like resolution was in the case of *Hearne* v. *Hearne*, 2 Vern. 555, in that of *Cowper* v. *Cotton*, February 16, 1731 (*b*), at the Rolls: where a freeman of London devised his estate to trustees for the raising 6000*l.* for his four daughters, and made a disposition of the surplus, it was held that they should stand either by the will or by the custom; and if by the former, that they should not defeat the devise over. That, in cases where general words in a will had been restrained from passing all which the testator had, it hath been upon the testator's intention manifestly appearing in the will itself, not to pass so much as the generality of his words would comprehend; but, in the present case, his intent plainly appears to pass all: nor will that intent be satisfied by saying, that he had a reversion of the lands comprised in the articles, since he would have been tenant in tail under the articles, and only for life under the will.

(*a*) Ante, p. 367.

(*b*) *Cowper* v. *Scott*, 3 P. Wms. 123.

Lord Chancellor Talbot.—It cannot be doubted but that, upon application to this Court for the carrying into execution the articles of 1677, the Court would have decreed it to be done in the strictest manner, and would never leave it in the husband's power to defeat and annul everything he had been doing: and the nature of the provision is strong enough for this purpose, without any express words, and I must, therefore, consider what was the

operation of the deed of 1698, which is declared to be in performance of the true intent and meaning of the articles. If it be so, all is well; but if it be not, it only shows that the parties intended it so, but were mistaken. So was the case of *West* v. *Errissey* (*a*), where the articles were, by the House of Lords, decreed to be made good; and the same must be done in this case, if nothing intervenes to prevent it.

(*a*) 2 P. Wms. 349; 1 Bro. P. C. 225; Toml. Edit.

The settlement, in 1716, whereby the grandfather settled other lands upon his son's marriage, has been called a satisfaction for those articles; but to me it appears neither an actual satisfaction nor to have been intended as such. The grandfather had done that in 1698, which he apprehended to be a satisfaction for the articles; but this deed proceeds upon considerations quite different from those of the articles, the persons claiming under this being purchasers for a consideration entirely new, the limitations being entirely different; and, therefore, it would be absurd to call this a satisfaction for another thing it hath nothing to do with, and to which it is no way relative.

The next thing to be considered is, the fine levied of the lands in question in the year 1723, by the grandfather; the intent whereof was to have the absolute ownership of those lands in him. And one reason why no application hath been made till now to have those articles carried into execution, might be that during the grandfather's life nobody was entitled to anything in possession under them.

Then comes the will in 1725, whereby he gives part of those lands, settled in 1698, to his daughters; thereby showing his apprehension to be, that, by a fine, he had given himself a power of disposing of them; and it would be a very strained construction to say that he intended this, not as a present devise to his daughters, but to take effect out of the reversion of the lands comprised in the articles.

The next thing is the devise to the trustees for his grandson the plaintiff, upon his attaining the age of twenty-one; and the question here is, whether the general

words shall ever pass lands not capable of the limitation in the will? And to that have been cited *Rose and Bartlett's case*, Cro. Car. 292, and other cases; but they cannot influence the present case: for, the testator had legally a power to dispose of those lands; and though they might be affected with a trust in equity, yet that cannot be supposed to lie in his conusance, he having done an act to enable himself to dispose of these lands. And it differs from the case that was put of an express trust, and the trustee devises *all his lands;* for there the trustee cannot be ignorant that the lands which he holds in trust are not his own. But what makes his intent clear is, that he hath devised part of these lands to his daughters, and he must have looked upon himself as master of the one part as well as the other; I, therefore, *think his intent was clear to pass these lands by the will;* and if so, we must now consider what will be the effect of this will.

If the plaintiff has a lien upon the lands of the articles, then he may stand to them if he pleases; *but when a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this Court compels the devisee, if he will take advantage of the will, to take entirely, but not partially under it: as was done in* Noys and Mordaunt's case; *there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made.* So are the several cases that have been decreed upon the custom of London.

The only difficulty in the present case is, that what is given to the plaintiff is precarious, nothing being given to him if he dies before twenty-one, and if after, then but an estate for life; and that he appears before the Court in the favourable light of being heir-at-law; but this will not alter the case. The estates which the testator has given him were undoubtedly in his power; he hath given them to trustees until his grandson attain twenty-one, and has disposed of them in such a manner as that there can never be any undisposed residue to go to

the plaintiff as heir-at-law; and surely it is as much in the power of the Court to make this bequest, thus limited, to be a satisfaction, if the party will stand to the will, as in the other cases. Indeed, if he takes by the will, there is nothing to make satisfaction to his sisters for their general chance under the articles; but that is because nothing is left them by the will; and they cannot be said to be quite destitute of provision, since it is just and reasonable that they should be maintained by their mother, who is entitled to a large and ample provision by her marriage settlement: nor can what is devised to the plaintiff be looked upon as intended by the testator to go towards the maintenance of younger childen; for, if the plaintiff dies before twenty-one, then all the profits already received are to go to his aunts; and so by that construction I must take the maintenance out of their estate, and oblige them to contribute to the maintenance of distant relations, viz., nieces, at the same time that the mother (who hath an ample provision) would be left at large, and under no tie of maintaining her own children.

And so decreed (*a*) the plaintiff to have six months after he comes of age, to make his election, whether he will stand to the will or the articles? And if he makes his election to stand to the latter, then so much of the other lands devised to him as will amount to the value of the lands comprised in the articles, and which were devised to Margaret and Martha, to be conveyed to them in fee.

(*a*) See the decree, 1 Swanst. 447; Reg. Lib. B. 1735, fol. 205.

Noys v. *Mordaunt*, and *Streatfield* v. *Streatfield*, are printed together since they are usually cited as having conclusively established the doctrine of election, which is founded upon the principle, that there is an implied condition, that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions, and renouncing every right inconsistent with them. See *Walpole* v. *Conway*, Barnard. Ch. Rep. 159; *Kirkham* v. *Smith*, 1 Ves. 258; *Macnamara* v. *Jones*, 1 Bro. C. C. 411; *Frank* v. *Standish*, 1 Bro. C. C. 588, n.; *Blake* v. *Bunbury*, 4 Bro. C. C. 21; *Swan* v. *Holmes*, 19 Beav. 471; *Wintour* v. *Clifton*,

21 Beav. 447, 8 De G. MacN. & G. 641; *Cosby* v. *Lord Ashtown*, 10 Ir. Ch. Rep. 219; *Heazle* v. *Fitzmaurice*, 13 Ir. Ch. Rep. 481, and *Dillon* v. *Parker*, 1 Swanst. 359, and *Gretton* v. *Haward*, 1 Swanst. 409, and Mr. Swanston's learned and elaborate notes to those cases.

To illustrate the doctrine of election, suppose A., by will or deed, gives to B. property belonging to C., and by the same instrument gives other property belonging to himself to C., a Court of equity will hold C. to be entitled to the gift made to him by A. only, upon the implied condition of his conforming with all the provisions of the instrument, by renouncing the right to his own property in favour of B.; he must, consequently, make his choice, or, as it is technically termed, he is put to his election, to take either under or against the instrument; if C. elects to take under, and consequently to conform with all the provisions of, the instrument, no difficulty arises, as B. will take C.'s property, and C. will take the property given to him by A.; but if C. elects to take against the instrument, that is to say, retains his own property and at the same time sets up a claim to the property given to him by A., an important question arises whether he thereupon incurs a forfeiture of the whole of the benefit conferred upon him by the instrument, or is merely bound to make compensation out of it to the person who is disappointed by his election. There are many dicta in favour of the doctrine of forfeiture. See *Cowper* v. *Scott*, 3 P. Wms. 124; *Cookes* v. *Hellier*, 1 Ves. 235; *Morris* v. *Burroughs*, 1 Atk. 404; *Pugh* v. *Smith*, 2 Atk. 43; *Wilson* v. *Mount*, 3 Ves. 194; *Wilson* v. *Townshend*, 2 Ves. jun. 697; *Broome* v. *Monck*, 10 Ves. 609; *Thellusson* v. *Woodford*, 13 Ves. 220; *Villareal* v. *Lord Galway*, 1 Bro. C. C. 292, n.; *Green* v. *Green*, 2 Mer. 86; and see the decision of Lord *Langdale*, M. R., in *Greenwood* v. *Penny*, 12 Beav. 406; and the late Mr. Jacob, in a note to 1 Roper on Husband and Wife, 566, supports the doctrine of forfeiture. The same view is also taken by Sir *Edward Sugden*. See 2 Sugd. Pow. 145, 7th edit.

The principal case of *Streatfield* v. *Streatfield*, is a distinct authority for the doctrine of compensation. See also *Webster* v. *Milford*, 2 Eq. Ca. Ab. 363, marg.; *Bor* v. *Bor*, 3 Bro. P. C. Toml. Ed. 167; *Ardesoife* v. *Bennet*, 2 Dick. 465; *Lewis* v. *King*, 2 Bro. C. C. 600; *Freke* v. *Barrington*, 3 Bro. C. C. 284; *Whistler* v. *Webster*, 2 Ves. jun. 372; *Ward* v. *Baugh*, 4 Ves. 627; *Lady Cavan* v. *Pulteney*, 2 Ves. jun. 560; *Blake* v. *Bunbury*, 1 Ves. jun. 523; *Welby* v. *Welby*, 2 V. & B. 190, 191; and Lord *Eldon*, in *Dashwood* v. *Peyton*, 18 Ves. 49; *Tibbits* v. *Tibbits*, Jac. 317; *Lord Rancliffe* v. *Parkyns*, 6

Dow. 179; and *Ker* v. *Wauchope*, 1 Bligh, 25, clearly recognises the principle of compensation, as applied to the doctrine of election. "In our courts," observes his Lordship, in the latter case, "we have engrafted upon this primary doctrine of election, the equity, as it may be termed, of *compensation*. Suppose a testator gives his estate to A., and directs that the estate of A., or any part of it, should be given to B. If the devisee will not comply with the provision of the will, the Courts of equity hold that another condition is to be implied as arising out of the will and the conduct of the devisee; that inasmuch as the testator meant that his heir-at-law should not take his estate which he gives A., in consideration of his giving his estate to B.; if A. refuses to comply with the will, B. shall be compensated by taking the property, or the value of the property, which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him." Nearly all these authorities are stated in Mr. Swanston's learned note to *Gretton* v. *Haward*, 1 Swanst. 433, and in his opinion they establish two propositions: "1st. That, in the event of election to take against the instrument, Courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints. 2nd. That the surplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right." See also *Padbury* v. *Clark*, 2 Mac. & G. 298; *Greenwood* v. *Penny*, 12 Beav. 403; *Howells* v. *Jenkins*, 1 De G. Jo. & Sm. 617; *Grissell* v. *Swinhoe*, 7 L. R. Eq. 291. And after the death of a person who has elected to take against an instrument compensation will be directed to be made out of his estate to the party who has sustained a loss thereby, so far as such loss does not exceed the benefit taken under the instrument by the person making such election: *Rogers* v. *Jones*, 3 Ch. D. 688, 690.

Moreover, where a person who elects to take a fund against an instrument, has been previously receiving money under it, he must on making his election repay such money, and the persons interested under the trusts of the instrument have a lien for the repayment thereof on the fund which he elects to take: *Codrington* v. *Lindsay*, 8 L. R. Ch. App. 578.

As the doctrine of election depends upon compensation, it follows that it will not be applicable unless there be a fund from which compensation can be made. Thus it was held, by Lord *Loughborough*, C., in *Bristowe* v. *Warde*, 2 Ves. jun. 336, that where, under a power to appoint to children,

the father made an appointment improperly, any child entitled in default of appointment might set it aside, although a specific share was appointed to him. "The doctrine of election," said his Lordship, "never can be applied, but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of, to compensate for what is taken away; therefore in all cases there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. That cannot apply to this case, where no part of his property is comprised in the will but that which he had power to distribute." So in *Box* v. *Barrett*, 3 L. R. Eq. 244, under a settlement the four daughters of a testator took equal shares subject to his life interest. The testator, by his will, recited that under the settlement his *two daughters, Ellen and Emily, would become entitled to certain hereditaments*, and that in making his will he had taken that into consideration, and had not devised them so large a share under his will, as he would have done had they not been so entitled. He then devised to his daughters, Ellen and Emily, certain estates, and to his other daughters, Edith and Eliza, certain other estates of much larger value. *The will did not purport to dispose of or affect the settled estates.* It was held by Lord *Romilly*, M. R., that as the will did not purport to make any disposition of the settled estates, and was only made under a mistaken impression, Edith and Eliza were not put to their election. "I am of opinion," said his Lordship, "that no case of election arises here. There must be some disposition of property which the testator had no right to dispose of to make it one. I assent to the observations that have been cited to me from the judgments in the cases of *Langslow* v. *Langslow* (21 Beav. 552) and *Blacket* v. *Lamb* (14 Beav. 482), which cases were decided by myself. In the present case there is nothing more than a recital of an intention under a belief which was erroneous, and thereupon the testator gives certain property in a particular way. If I were to hold that a case of election arises here, the most serious and yet strange results would follow: for, suppose a man recited in his will that his nephew would have a large fortune from his father, and that, therefore, he left all his property to his other nephew, and that recital turned out to be incorrect, would any question of election arise upon that, because the supposed intention of the testator was that the property should be divided equally? The most that can be said of the recital in the case before me now is, that it is an erroneous one; but, because the

testator has made a mistake, you cannot afterwards remodel the will and make it that which you suppose he intended, and as he would have drawn it if he had known the incorrectness of his supposition." See also *Banks* v. *Banks*, 17 Beav. 352; *In re Fowler's Trust*, 27 Beav. 362, Lead. Cas. R. P. 352, 2nd ed.

It seems to be doubtful whether the doctrine of election applies to grants from the Crown, for the Crown is always in existence and can always be applied to, to set right the grant; per Sir *T. Plumer*, M. R., 2 J. & W. 345. Where, however, two persons A. and B. joined in a petition to the Crown, representing an estate to have escheated, and procured a grant of it to be made to them, it was held by Sir *T. Plumer*, M. R., that the assignees of A. could not afterwards set up a claim to one part under a prior title in himself, while taking the benefit of the grant as to the rest: *Cumming* v. *Forrester*, 2 J. & W. 334.

The doctrine of election is applicable to deeds as well as to wills (*Llevellyn* v. *Mackworth*, Barnard. Ch. Rep. 445; *Bigland* v. *Huddleston*, 3 Bro. C. C. 286, n.; *Moore* v. *Butler*, 2 S. & L. 266; *Birmingham* v. *Kirwan*, 2 S. & L. 450; *Green* v. *Green*, 2 Mer. 86; *Bacon* v. *Cosby*, 4 De G. & Sm. 261; *Cumming* v. *Forrester*, 2 J. & W. 345; *Anderson* v. *Abbott*, 23 Beav. 457; *Mosley* v. *Ward*, 29 Beav. 407; *Codrington* v. *Lindsay*, 8 L. R. Ch. App. 578; *S. C.*, nom. *Codrington* v. *Codrington*, 7 L. R. Ho. Lo. 854): although by the civil law, from which it appears to have been borrowed by our courts of equity, it was confined to wills. See Mr. Swanston's note to *Dillon* v. *Parker*, 1 Swanst. 394. And notwithstanding the opinion of Lord *Hardwicke*, in *Bor* v. *Bor*, 3 Bro. P. C. 178, n., Toml. Ed., and the decision in *Stewart* v. *Henry*, Vern. & Scriv. 49, the doctrine of election is applicable to interests remote, contingent, or of small value, as well as to those which are immediate or of great value: *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; *Graves* v. *Forman*, cited 3 Ves. 67; *Highway* v. *Banner*, 1 Bro. C. C. 584; *Wilson* v. *Townsend*, 2 Ves. jun. 697; *Morgan* v. *Morgan*, 4 Ir. Ch. Rep. 606; *Sadlier* v. *Butler*, 1 I. R. Eq. 415; *Henry* v. *Henry*, 6 I. R. Eq. 286.

In order to raise a case of election, at any rate in the case of a will, there must appear in the will itself a clear intention on the part of the testator to dispose of that which is not his own (*Forrester* v. *Cotton*, 1 Eden, 531; *Judd* v. *Pratt*, 13 Ves. 168; 15 Ves. 390; *Dashwood* v. *Peyton*, 18 Ves. 27; *Blake* v. *Bunbury*, 4 Bro. C. C. 21; *S. C.*, 1 Ves. jun. 514; *Ranclijfe* v. *Lady Parkyns*, 6 Dow, 149, 179; *Dillon* v. *Parker*, 1 Swanst. 359; *S. C.*, Wils. 253; Jac. 505; 7

Bligh, N. S. 325; 1 C. & F. 303; Sugd. Prop. 450; *Jervoise* v. *Jervoise*, 17 Beav. 566; *Padbury* v. *Clark*, 2 Mac. & G. 298; *Lee* v. *Egremont*, 5 De G. & Sm. 348; *Wintour* v. *Clifton*, 21 Beav. 447, 8 De G. Mac. & G. 641; and *Stephens* v. *Stephens*, 3 Drew. 697; 1 De G. & Jo. 62; *Poole* v. *Olding*, 10 W. R. (V.-C. K.) 337 (L. J.) 591; *Fox* v. *Charlton*, 10 W. R. (V.-C. K.) 506; *Thornton* v. *Thornton*, 11 Ir. Ch. Rep. 474; *Box* v. *Barrett*, 3 L. R. Eq. 244; *Sadlier* v. *Butler*, 1 Ir. Eq. 415): and it is immaterial whether he knew the property not to be his own, or by mistake conceived it to be his own; for, in either case, if the intention to dispose of it appears clearly, his disposition will be sufficient to raise a case of election: (*Whistler* v. *Webster*, 2 Ves. jun. 370; *Thellusson* v. *Woodford*, 13 Ves. 221; *Welby* v. *Welby*, 2 V. & B. 199, overruling *Cull* v. *Showell*, Amb. 727; *Whitley* v. *Whitley*, 31 Beav. 173; *Coutts* v. *Ackworth*, 9 L. R. Eq. 519).

And it is likewise immaterial that a party put to his election, by a will, disposes after the date thereof (as, for instance, by putting it into settlement) of property belonging to himself, which the testator affects to dispose of by his will. See *Middleton* v. *Windross*, 16 L. R. Eq. 212, there a testator gave all his property equally among his three daughters, Sarah, Margaret, and Jane, and directed Jane, within twelve months after attaining twenty-one, to bring into hotchpot an estate to which she was entitled under the will of her grandfather. On Jane's marriage, subsequently to the date of the will, she, at the instance and under the superintendence of her father, settled the estate upon herself and her husband successively for life, with remainder to the children of the marriage. Afterwards, by the testator's advice, the estate was sold by the trustees for 3000*l.* In a suit to administer the testator's estate, it was held by *Wickins*, V.-C., that the 3000*l.*, less the costs of the sale, ought to be brought into account in respect of Jane's share.

The difficulty of sustaining a case of election is always much greater where the testator has a partial interest in the property dealt with, than where he purports to devise an estate in which he has no interest at all (*Lord Rancliffe* v. *Lady Parkyns*, 6 Dow, 185; *Henry* v. *Henry*, 6 I. R. Eq. 286). For if the testator has some interest, the Court will lean as far as possible to a construction which would make him deal only with that to which he is entitled: *Maddison* v. *Chapman*, 1 J. & H. 470; *Re Bidwell's Settlement*, 11 W. R. (V.-C. K.) 161; *Henry* v. *Henry*, 6 I. R. Eq. 286.

Where however a testator entitled only to part of an estate

uses words in devising it which show clearly that he intended to pass the entirety, if the owner of the other part takes other benefits by the will, he will be put to his election: *Padbury* v. *Clark*, 2 Mac. & G. 298; *Wintour* v. *Clifton*, 21 Beav. 447; 8 De G. Mac. & G. 644; *Grosvenor* v. *Durston*, 25 Beav. 97; *Usticke* v. *Peters*, 4 K. & J. 437; *Fitzsimons* v. *Fitzsimons*, 28 Beav. 417; *Howells* v. *Jenkins*, 2 J. & H. 706; 1 De G. Jo. & Sm. 617; *Miller* v. *Thurgood*, 33 Beav. 496; *Wilkinson* v. *Dent*, 6 L. R. Ch. App. 339; but see *Chave* v. *Chave*, 2 J. & H. 713, n.

A mere general devise will only comprehend property of which the devisor is owner, and although at one time a different opinion prevailed, it is now clearly settled that parol evidence, dehors the will, is not admissible for the purpose of showing that a testator considering property to be his own, which did not actually belong to him, intended to comprise it in a general devise or bequest. See *Pulteney* v. *Lord Darlington*, referred to in 2 Ves. jun. 544; 3 Ves. 384, 521, 529; 6 Ves. 314, 322, 391, 399, 402, in which case rent-rolls and steward's accounts, agreements of solicitors, cases and opinions of counsel, and all sorts of papers, were admitted to be read, to prove that the testator dealt with property of which he was tenant in tail, as absolute owner, and that he intended to comprise it in a general devise; so that the heir in tail, who took other benefits under the will, was compelled to elect, although the testator had large real estates to satisfy the words of the devise. See also, *Finch* v. *Finch*, 4 Bro. C. C. 38; *S. C.*, 1 Ves. jun. 534; *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516; *Rutter* v. *Maclean*, 4 Ves. 531; *Pole* v. *Lord Somers*, 6 Ves. 309; *Druce* v. *Denison*, 6 Ves. 385. Lord Commissioner *Eyre*, however, in *Blake* v. *Bunbury*, 1 Ves. jun. 523, says, "that the intent of the testator to dispose of that which is not his, ought to appear upon the will;" and in *Stratton* v. *Best*, 1 Ves. jun. 285, where a testator suffered a recovery of the whole of a manor, though he was only entitled to a part of it, and afterwards devised in general words all his real and personal estate to trustees, Lord *Thurlow* refused to admit evidence to show that the testator supposed himself entitled to the whole manor. "I admit," observed his Lordship, "you have proved, that in 1764, when the recovery was suffered, he took himself to be master of the whole. I have no doubt but that, if he had been asked, when he made his will, whether he did not mean the whole, he would have said yes; and if desired to put in a description of it he would have done so: that I believe, upon the evidence you have brought. But to do this I must say that evidence, dehors

the will, of the testator's opinion at any time, may be produced: and I do not think that is the law of the Court. All the argument in *Noys* v. *Mordaunt*, and the whole suite of cases upon this subject, have turned upon the expressions of the will. If I was to receive evidence of the testator's fancy, I should introduce a very desperate rule of property in this Court." Lord *Rosslyn*, in the case of *Rutter* v. *Maclean*, 4 Ves. 537, expressed himself dissatisfied with *Pulteney* v. *Darlington*, as did also Lord *Eldon*, in *Pole* v. *Somers*, 6 Ves. 322; and in *Druce* v. *Denison*, 6 Ves. 402, where he observed that he agreed with Lord *Rosslyn*, and that he could not see upon what principle the evidence was admitted in that case. See also *Doe* v. *Chichester*, 4 Dow, 76, 89, 90, and the case of *Clementson* v. *Gandy*, 1 Kee. 309, where parol evidence was tendered for the purpose of showing that the testatrix intended to pass, under a general bequest, certain property in which she had only a life interest, supposing it to be her own absolutely, so as to put a legatee who had an interest in the property to his election. However, Lord *Langdale*, M. R., refused to admit the evidence. "I am of opinion," observed his Lordship, "that this evidence cannot be admitted. It is tendered for the purpose of showing that the testatrix bequeathed property as her own which did not belong to her; and that she intended to leave a considerable residue for charitable purposes, which, by reason of that mistake, turns out to be much less than she intended; and it is argued that this raises a case of election. The intention to dispose must in all cases appear by the will alone. In cases which require it, the Court may look at external circumstances, and consequently, receive evidence of such circumstances for the purpose of ascertaining the meaning of the terms used by the testator. But parol evidence is not to be resorted to except for the purpose of proving facts which make intelligible something in the will which, without the aid of extrinsic evidence, cannot be understood." See also *Blonmart* v. *Player*, 2 S. & S. 597; *Dummer* v. *Pitcher*, 2 My. & K. 262; *Crabb* v. *Crabb*, 1 My. & K. 511; 5 Sim. 35; *Smith* v. *Lyne*, 2 Y. & C. C. C. 345; *Allen* v. *Anderson*, 5 Hare, 163; *Seaman* v. *Woods*, 24 Beav. 372.

But a testator may in his will itself show an intention under a general devise to dispose of property which is not absolutely his own, for instance of which he is only tenant in tail (even when he has other property which might satisfy the words of the devise), so as to put the heir in tail to his election between the estate and benefits conferred upon him by the will. See *Honywood* v. *Forster*, 30 Beav. 14. There a tes-

tator had freeholds in fee, and was tenant in tail of copyholds. They were intermixed; part of the copyholds were in his own occupation, and part, with parts of the freeholds, in the occupation of tenants upon leases at one rent. By his will he devised "all his real estates" to the defendants, and gave all the lands occupied by him to his wife for life, and confirmed the tenants in their occupations for twenty-one years. He likewise gave benefits to the heir in tail of the copyholds. It was held, by Sir *John Romilly*, M. R., that the heir must be put to his election. "If," said his Honor, "a testator says, 'I give all the property I have in the world to A. B.,' and he leaves a large legacy to his heir in tail, that will not raise a case of election against such heir, because the testator only gives what he has. It occurred to me at first that such was the character of the present will; but on the facts of the case being brought to my attention, it became plain that such was not the case. . . . . It was a just observation made to me, that the scope of the will is to dispose of two sorts of properties—the property he occupied himself, and the property which was occupied by his tenants. The property occupied by himself he left to his wife for her life, and as to the property occupied by his tenants, he directed that his executors should confirm their occupation by leases for a period of twenty-one years. The property occupied by himself included some of the copyholds in question; and it is therefore clear that he intended to give them to his wife for life; the land in the occupation of his tenants included the remainder of the copyholds, and he directs the executors to confirm to them for twenty-one years, the leases of the property they held, which are part of the copyholds in question. I think that in this state of circumstances, coupled with the fact of the nature and holding of the property, there *is an intention shown on the face of the will* to dispose of these copyholds away from the heir in tail. I am of opinion, therefore, that the plaintiff must elect either to take the copyholds in question, and give up the benefits bequeathed to him by the will, or to take under the will and give up the copyholds."

With regard to deeds, a question of election may be raised, without there being, as in the case of wills, (*ante*, p. 381) a clear intention on the part of the settlor or others to dispose of property which was not his own. The principle upon which cases of election are raised in deeds being that which Lord *Redesdale* in *Birmingham* v. *Kirwan*, 2 S. & L. 444, 448, states to be the general foundation of the law of election, viz., that a person cannot accept and reject the same instrument.

See *Codrington* v. *Lindsay*, 8 L. R. Ch. App. 578. For the application of this principle to voluntary deeds, see *Llewellyn* v. *Mackworth*, Barnard. Ch. Rep. 445; *Anderson* v. *Abbott*, 23 Beav. 457; to cases of contract for valuable consideration resting in articles, see *Savill* v. *Savill*, 2 Coll. 721; *Brown* v. *Brown*, 2 L. R. Eq. 481; to contracts, for value completely executed by conveyance and assignments, see *Bigland* v. *Huddleston*, 3 Bro. C. C. 285 n.; *Chetwynd* v. *Fleetwood*, 4 Bro. P. C. 435, Ed. 1784; *Green* v. *Green*, 2 Mer. 86; *Bacon* v. *Cosby*, 4 De G. & Sm. 261; *Mosley* v. *Ward*, 29 Beav. 407; *Willoughby* v. *Middleton*, 2 J. & H. 344.

The rule of election, the subject of this note, which depends, as before observed, upon an implied condition, will not be excluded by the parties being expressly put to their election, as between the benefits conferred upon them, and sums due to them from the person conferring such benefits. See *Wilkinson* v. *Dent*, 6 L. R. Ch. App. 339. There, a testatrix devised "all and singular the estate and mines of Aroa," to trustees in trust for sale, and gave to T. Dent 10,000*l*., which was to be taken in full satisfaction of any sums which she might owe him at her decease, and to W. Dent 3000*l*., which she declared was to be taken in satisfaction of any rent-charge out of a certain part of her real estate. Her will contained the usual devise of trust and mortgage estates. She was in possession of the entirety of the Aroa estate, but was owner only of one moiety, being in possession of the other moiety by virtue of a mortgage, the money due upon which was subject to trusts, under which T. Dent and W. Dent on her death became entitled, each to one fifth. It was held by the Lords Justices, affirming the decision of Lord *Romilly*, M. R., that T. Dent and W. Dent were put to their election between the benefits they took under the will, and their shares in the mortgage money. "The question," said Lord Justice *James*, "is, whether there is testamentary bounty to persons whose estates and rights are, under another part of the will, interfered with. It appears to me clear, that this question must be answered in the affirmative, though, before the amount of the bounty can be ascertained, the amount of the claims which the legatees had against the testatrix must be ascertained." See and consider *Synge* v. *Synge*, 9 L. R. Ch. App. 128, varying the decision of *James*, L. J., sitting for a V.-C., reported 15 L. R. Eq. 389.

But the ordinary doctrine of election may be excluded by an apparent expression of intention by a testator that only one of the gifts, to an object of his bounty, is conditional on his giving up what the testator purports to take

away from him. For instance, if a testator had an eldest son, owner of a bit of property, and it would be convenient that this bit of property should go along with a property which the testator is devising to his second son. So, the testator devises this bit of property to the second son; and amongst other gifts to his eldest son, he gives him a piece of property which he states in his will to be in lieu of his bit of property which the testator purported to take away from him. In such case, the eldest son would merely be put to his choice between those two bits of property: *East* v. *Cook*, 2 Ves. 30, as explained by Lord Justice *James*, in *Wilkinson* v. *Dent*, 6 L. R. Ch. App. 341.

The question has been raised whether, where a testator makes two or more separate devises or bequests, the devisee is bound to elect to take all or none of the gifts, or whether he may accept what is beneficial and reject what is burdensome. These cases, though at first sight similar, are in reality different from cases of election, properly so called, which, as we have before seen, arise where a person disposes of that which is *not his own* (*ante*, p. 378), and confers upon the real owner of the property other benefits, in which case it is at once implied independently of any intention expressed upon the face of the instrument, that the party upon whom such benefits are conferred must elect between his own property and such benefits. But where the gifts, whether beneficial or onerous, are all the property of the testator, the devisee may take what is beneficial and reject what is onerous (*Andrew* v. *Trinity Hall*, 9 Ves. 525; *Moffett* v. *Bates*, 3 Sm. & G. 468; *Warren* v. *Rudall*, 1 J. & H. 1). But where it appears upon the will that it was the intention of the testator to make the acceptance of the burden a condition of the benefit, the result will be different: *Talbot* v. *Lord Radnor*, 3 My. & K. 252; *Warren* v. *Rudall*, 1 J. & H. 13; and see *Long* v. *Kent*, 13 W. R. (V.-C. S.) 961.

Although, under the old law, a devise to the heir was in a certain sense inoperative, as he took by *descent* as heir, and not by purchase as devisee, it has been held, ever since the decision of *Noys* v. *Mordaunt*, to be a sufficient gift to him of the testator's property to raise a case of election, should the testator devise or bequeath to another, property belonging to the heir. "That an heir," observes Sir *W. Grant*, M. R., "to whom an estate is devised in fee, may be put to an election, although, by the rule of law, a devise in fee to an heir is inoperative, I should have thought perfectly clear, independently of Lord *Cowper's* decision in the case of Gilbert; for if the will is in other respects so framed as to raise a case of election, then not only is the estate given to the

heir under an implied condition, that he shall confirm the whole of the will, but in contemplation of equity, the testator means, in case the condition shall not be complied with, to give the disappointed devisees out of the estate, over which he had a power, a benefit correspondent to that of which they are deprived by such non-compliance. So that the devise is read as if it were to the heir absolutely, if he confirm the will; if not, then in trust for the disappointed devisees as to so much of the estate, given to him, as shall be equal in value to the estates intended for them:" *Welby* v. *Welby*, 2 V. & B. 190; *Anon.*, Gilb. 15; *Thellusson* v. *Woodford*, 13 Ves. 209; *S. C.*, 1 Dow, 249, nom. *Rendlesham* v. *Woodford; à fortiori* will the heir now be put to his election, since, by the Act for the Amendment of the Law of Inheritance (3 & 4 Will. 4, c. 106) where lands are devised by the will of a testator dying after the 31st of December, 1833, to the heir, he will take as devisee by purchase, and not by descent. See *Schroder* v. *Schroder*, Kay, 578.

Where an express appointment is made to a stranger to the power, which is therefore void, and a benefit is conferred by the same instrument upon a person entitled in default of appointment, the latter will be put to his election. Thus, "where a man having a power to appoint to A. a fund, which in default of appointment is given to B., exercises the power in favour of C., and gives other benefits to B., although the execution is merely void, yet if B. will accept the gifts to him, he must convey the estate to C. according to the appointment," Sug. Pow. 578, 8th ed.; *Whistler* v. *Webster*, 2 Ves. jun. 367; *Reid* v. *Reid*, 25 Beav. 469; *Ex parte Bernard*, 6 Ir. Ch. Rep. 133; *Tomkyns* v. *Blane*, 28 Beav. 422. "So where a person has power to appoint to two, and he appoints to one only, and gives a legacy to the other, that is a case of election:" Sug. Pow. 589, 8th ed.; *Wollen* v. *Tanner*, 5 Ves. 218; *Vane* v. *Lord Dungannon*, 2 S. & L. 118. So where a person having a power to appoint, delegates the power (which he has really no right to do) to another, and by the same instrument confers benefits upon the objects of the power they cannot retain the benefits given to them by the will and also claim the property against the execution of the power so improperly delegated: *Ingram* v. *Ingram*, cited 1 Ves. 259.

Merely precatory words, requesting appointees, objects of the power, to leave the fund appointed to others, not objects of the power, will not raise a case of election. *Blacket* v. *Lamb*, 14 Beav. 482; *Kampf* v. *Jones*, 2 Keen, 756; *Carver* v. *Bowles*, 2 Russ. & My. 301.

Where a person appoints simply

to objects of the power, and gives them property of his own, subsequently directing them to settle the property so appointed on persons not objects of the power, such direction will not raise a case of election (*King* v. *King*, 15 Ir. Ch. Rep. 479, overruling *Moriarty* v. *Martin*, 3 Ir. Ch. Rep. 26). Secus where there is a clause of forfeiture of the legacies on non-compliance with such direction (*Ib.*).

And it has been recently decided that where there is an absolute appointment by will in favour of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed in a manner which the law will not allow, the will must be read as if all the passages in which such attempts are made were swept out of it, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election: *Woolridge* v. *Woolridge*, 1 Johns. 63. See, also, *Churchill* v. *Churchill*, 5 L. R. Eq. 44.

And in no instance has a case of election been raised where a testator gave no property absolutely his own to an object of the power out of which, in the event of his not acquiescing in an appointment by the donee to a person not an object of the power, the latter could be compensated. *In re Fowler's Trust*, 27 Beav. 362; *Armstrong* v. *Lynn*, 9 I. R. E. 186. Neither will the non-execution of a power upon an erroneous impression stated in the will that, by its non-execution one person who is a legatee will divide the fund equally with another: *Langslow* v. *Langslow*, 21 Beav. 552.

But where the donee of a power by the same instruments appoints to a stranger, and confers benefits out of property *absolutely his own* upon an object of the power, the latter will be put to his election, and if he takes the benefits conferred upon him, he must comply with the directions, or if he declines to do so he must give up the benefits so far as may be necessary for compensating the person disappointed by his election. See *Blacket* v. *Lamb*, 14 Beav. 482.

In a recent case, A. had power to appoint by will a fund to any one or more of his children. He had under a distinct instrument power to appoint another fund amongst his children, but not exclusively to any one of them, and they were to take equally in default of appointment. He had five children. By his will he exercised the first power in favour of S., one of his children, and the second in favour of two others of his children. The second power was accordingly badly exercised, and S. took a share in default of appointment. It was held by Sir

W. Page Wood, V. C. that no case of election was raised against S.: *Re Aplin's Trust*, 13 W. R. (V.-C. W.) 1062.

So where an appointment was made of the interest of a fund to a person for life, irrevocably, and after his decease the fund was appointed to others, with power to the appointor, by deed or will, to revoke the appointments subsequent to the life interest, and the appointor afterwards, supposing he had complete dominion over the fund, revoked all the appointments before made, giving the person entitled to the interest of the fund for life part of it absolutely, and the remainder of the fund to others, the person to whom, under the first appointment, a life interest was given in the whole fund, was compelled to elect between the life interest in the whole fund, and his interest in part of the fund given to him absolutely, under the second appointment. *Coutts* v. *Acworth*, 9 L. R. Eq. 519.

It seems that when there is an attempt to create a power in violation of the rules of law, as for instance, the rule against perpetuities, the Court will not aid such an attempt, by the application of the doctrine of election: *Wollaston* v. *King*, 8 L. R. Eq. 165, 175.

The rule as to election is to be applied, as between a gift under a will, and a claim dehors the will, and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will. See *Wollaston* v. *King*, 8 L. R. Eq. 165. There, Mrs. King, having, under her marriage settlement, power to appoint a fund in favour of the children of the marriage, by her will, in execution of the power, appointed a portion of the fund to her son, J. E. King, for life, with remainder to such persons *as he should by will appoint*. There was also a general residuary appointment of the settled fund (subject to all other appointments made thereof), to Mrs. King's three daughters, to whom benefits out of Mrs. King's own property were also given by the will. The appointment in favour of J. E. King's appointees being void for remoteness, the property comprised therein, upon the death of J. E. King, went to the three daughters of Mrs. King under the residuary appointment in her will. It was held by Sir *W. M. James*, V. C., that the daughters were not put to their election between the benefits which they took under the will in the testatrix's own property, and the settled property which they took under the residuary appointment in the will. "The ordinary principle," said his Honor, "is clear, that if a testator gives property, by design or by mistake, which is not his to give, and gives at the same time to the real owner of it other property, such real owner

cannot take both. And the principle has been applied where the first gift is made, purporting to be in execution of a power; so that, if under a power to appoint to children, the donee of the power appoints to grandchildren, which is bad, and the children who are entitled to claim by reason of the badness of the appointment, also take under the will other property, the grandchildren are entitled to put them to an election. But to this rule, so far as regards appointments, a notable exception is taken; viz., that when there is an appointment to an object of the power, with directions that the same shall be settled, or upon any trust, or subject to any condition, then the appointment is held to be a valid appointment, and the superadded direction, trust, or condition is void, and not only void, but inoperative to raise any case of election.

"This rule has not been followed in the Irish case of *Moriarty* v. *Martin* (3 Ir. Ch. Rep. 26), which is said to have received the approval of Lord *St. Leonards*. Notwithstanding that case, and that approval, I feel bound by the current of English authorities. I have endeavoured to extract from these cases a principle which I can apply to the decision of the case before me. The rule laid down by the Master of the Rolls in *Whistler* v. *Webster* (2 Russ. & My. 301) is, in general terms, that no man shall claim any benefit under a will without conforming, so far as he is able, and giving effect to everything contained in it, whereby any disposition is made, showing an intention that such a thing shall take place."

"This rule, expressed in these terms, was certainly not applied in the case of *Carver* v. *Bowles* (2 Russ. & My. 301), and the cases which followed it. There, it was clear, that certain persons were intended to take benefits under the will, and other persons were allowed to take other benefits, without conforming to, and giving effect to, the first dispositions and, in fact, after defeating them. But why? The only intelligible principle which I can find is, that it was held, that the failure of the first dispositions, so far as they failed, did, under the will itself, enure for the benefit of the legatees; that the legatees were allowed to retain both benefits, because they took both as legatees under the will itself, without calling in aid any other instrument or adverse title. It results in this, that *the rule as to election is to be applied as between a gift under a will, and a claim dehors the will, and adverse to it, and is not to be applied as between one clause in a will, and another clause in the same will.*" See *Wallinger* v. *Wallinger*, 9 L. R. Eq. 301.

No case of election will be raised where there is a want of capacity

to devise real estate by reason of infancy. Thus, under the old law, where an infant, whose will was valid as to personal, but invalid as to real estate, gave a legacy to his heir-at-law, and devised real estate to another person, the heir-at-law would not have been obliged to elect between the legacy and the real estate, which descended to him in consequence of the invalidity of the devise; he might take both: *Hearle* v. *Greenbank*, 3 Atk. 695, 715; 1 Ves. 298.

Nor will a case of election be raised if there is a want of capacity to bequeath arising from coverture. Thus, where a feme covert made a valid appointment by will to her husband, under a power, and also bequeathed to another personal estate, to which the power did not extend, the husband was not put to his election, but was held to be entitled to the benefit conferred upon him by the power, and also to the property bequeathed by his wife, to which he was entitled jure mariti: *Rich* v. *Cockell*, 9 Ves. 369. See also *Blaiklock* v. *Grindle*, 7 L. R. Eq. 215.

With regard to infants, however, it must be remembered, that the Wills Act, (1 Vict. c. 26,) s. 7, renders them incapable of making a will even of personalty.

Previous to the Wills Act, (1 Vict. c. 26,) where a testator by a will, not properly attested for the devise of freeholds, but sufficient to pass personal estate, devised freehold estates away from his heir, and gave him a legacy, the question has arisen, whether the heir-at-law was not obliged to elect between the freehold estate which descended to him in consequence of the devise being inoperative, and the legacy; it is clearly settled that he would not be obliged to elect (*Sheddon* v. *Goodrich*, 8 Ves. 481; *Gardiner* v. *Fell*, 1 J. & W. 22; *Wilson* v. *Wilson*, 1 De G. & Sm. 152; and see *Middlebrook* v. *Bromley*, 11 W. R. (V.-C. K.) 712;) unless the legacy were given to him with an express condition, that if he disputed or did not comply with the whole of the will, he should forfeit all benefit under it: *Boughton* v. *Boughton*, 2 Ves. 12. "Lord *Kenyon* said, the distinction was settled, and not to be unsettled, that if a pecuniary legacy was bequeathed by an unattested will, under an express condition to give up a real estate by that unattested will attempted to be disposed of, such condition being expressed in the body of the will, it was a case of election, as he could not take the legacy without complying with the express condition. But Lord *Kenyon* also took it to be settled, as Lord *Hardwicke* has adjudged, that if there was nothing in the will but a mere devise of real estate, the will was not capable of being read as to that part; and unless, according to an express condition, the legacy was given, so that the testator said expressly

the legatee should not take unless that condition were complied with, it was not a case of election. The reason of that distinction, if it were res integra, is questionable." Per Lord *Eldon*, in *Sheddon* v. *Goodrich*, 8 Ves. 496. See also *Brodie* v. *Brady*, 2 V. & B. 130.

These questions will not arise under wills coming within the Wills Act, (1 Vict. c. 26,) because if they are sufficiently attested for the bequest of a personal legacy, they will also pass freehold estates.

Previous to the Wills Act (1 Vict. c. 26,) a testator could not devise after-acquired lands, for although by his will he devised lands of which he should be seised at the time of his decease, they would descend to his heir: *Bunker* v. *Coke*, 1 Bro. P. C. 199; *S. C.*, 1 Salk. 234; Holt's Rep. 248; Fitzger. 228: the reason being that the Statute of Wills (32 Hen. 8, c. 1) gives the power of disposition by will of lands only to persons *having* lands, but does not give power to persons *not having lands*, to make any disposition of such as they *shall have*.

When therefore a testator devised after-acquired lands away from his heir, he nevertheless took such lands by descent, subject however to the application of the doctrine of election; for the rule in such cases was, that if the testator showed a clear intention of disposing of after-acquired estates, the heir was obliged to elect between the after-acquired estates which would descend to him, and any benefits given him by the will (*Thellusson* v. *Woodford*, 13 Ves. 209; *S. C.*, *Rendlesham* v. *Woodford*, 1 Dow, 249; *Churchman* v. *Ireland*, 4 Sim. 520; 1 Russ. & My. 250; *Greenwood* v. *Penny*, 12 Beav. 403; *Schroder* v. *Schroder*, Kay, 578, *S. C.*, on appeal, 24 L. J. (N.S.) Ch. 510; *Hance* v. *Truwhitt*, 2 J. & H. 216); but not if the intention of the testator to dispose of the after-acquired estates was equivocal: *Back* v. *Kett*, Jac. 534. But here, again, the law has been altered by 1 Vict. c. 26, s. 24, which enacts, "That every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Previous to 55 Geo. 3, c. 192 (which rendered a surrender of copyholds to the use of wills unnecessary for the future), it was held, that the heir to whom copyholds descended, in consequence of their not having been surrendered to the use of a will, was obliged to elect between the copyholds and any benefit he may have taken under the will. See *Unett* v. *Wilkes*, Amb. 430; 2 Eden, 187; *Rumbold* v. *Rumbold*, 3 Ves. 65; *Pettiward* v. *Prescott*, 7 Ves. 541; but in *Judd* v. *Pratt*, 13 Ves. 168, 15 Ves. 390, the heir was not compelled to elect, because

the testator, having freeholds as well as copyholds, was held not to have sufficiently indicated his intention to pass the copyholds by a mere general devise of all his real estate.

The heir of heritable property in Scotland, becoming entitled to it in consequence of the will, by which it is devised to another, not being conformable to the solemnities required by the law of Scotland, and taking also under the same will real or personal property in this country, will be compelled to elect between the heritable property which has descended to him as heir, and the benefits given to him by the will: *Brodie* v. *Barry*, 2 V. & B. 127; *Orrell* v. *Orrell*, 6 L. R. Ch. App. 302; *Dewar* v. *Maitland*, 2 L. R. Eq. 834, as to lands in St. Kitt's; *M'Call* v. *M'Call*, Dru. Ca. t. Sugd. 283; *Harrison* v. *Harrison*, 8 L. R. Ch. App. 342; *secus*, if it does not appear clearly that the testator intended to pass his Scotch estates: *Johnson* v. *Telfourd*, 1 Russ. & My. 244; *Allen* v. *Anderson*, 5 Hare, 163; *Maxwell* v. *Maxwell*, 16 Beav. 106; 2 De G. Mac. & G. 705; *Lamb* v. *Lamb*, 5 W. R. (V.-C. K.) 720; *Maxwell* v. *Hyslop*, 4 L. R. Eq. 407.

A widow may at law be put to her election by express words between her dower and a gift conferred upon her (*Gosling* v. *Warburton*, Cro. Eliz. 128; *Lacy* v. *Anderson*, Choice Cases in Chancery, 155; *Boynton* v. *Boynton*, 1 Bro. C. C. 445; see *Dyke* v. *Rendall*, 2 De G. Mac. & G. 209: *Nottley* v. *Palmer*, 2 Drew. 93; *Fytche* v. *Fytche*, 7 L. R. Eq. 494), in equity she may be put to her election between dower, and a gift conferred upon her, by manifest implication, demonstrating the intention of the donor to exclude her from her legal right to dower. "If," observes Lord *Redesdale*, "there be anything ambiguous or doubtful,—if the Court cannot say that it was clearly the intention to exclude,—then the averment that the gift was made in lieu of dower cannot be supported: and, to make a case of election, that is necessary; for a gift is to be taken as pure, until a condition appear. . . . The only question made in all the cases is, whether an intention, not expressed by apt words, could be collected from the terms of the instrument. The result of all the cases of implied intention seems to be, that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds." *Birmingham* v. *Kirwan*, 2 S. & L. 452.

Where the widow is not in express terms excluded from her right to dower, a question arises, and it is one by no means free from difficulty, what is a gift inconsistent with her assertion of that right? It has been long since settled in cases previous to the Dower Act (3 & 4 Will. 4,

c. 105) coming into operation, that a devise by a testator to his widow of *part of* the lands of which she is dowable, is not inconsistent with her claim to dower in the remainder; this was decided in the leading case of *Lawrence* v. *Lawrence*. There the testator devised part of his real estate to his wife during her widowhood, and devised the residue to trustees, in trust for other persons; and he bequeathed to his widow several specific and pecuniary legacies. It was held by Lord Keeper *Wright*, on appeal, reversing the decision of Lord *Somers*, and afterwards by Lord *Cowper* and the House of Lords, affirming the decision of Lord Keeper *Wright*, that the widow was not obliged to elect between her dower and the benefits derived under the will, and that she was entitled to both: 2 Vern. 365; 2 Freem. 234, 235; 3 Bro. P. C. 483, Toml. Ed. See also *Lemon* v. *Lemon*, 8 Vin. Abr. "Devise," p. 366, pl. 45; *French* v. *Davies*, 2 Ves. jun. 572; *Strahan* v. *Sutton*, 3 Ves. 249; *Lord Dorchester* v. *Earl of Effingham*, Coop. 319; *Brown* v. *Parry*, 2 Dick. 685; *Incledon* v. *Northcote*, 3 Atk. 430, 436; and *Gibson* v. *Gibson*, 1 Drew. 42.

A devise of lands, out of which the widow is dowable, upon *trust for sale*, is not inconsistent with her claim to dower out of those lands, even although the interest of a part of the proceeds of the sale is given to her. Thus, in *Ellis* v. *Lewis*, 3 Hare, 310, a testator devised all his real estate to a trustee upon trust for sale, with power to convey the same to purchasers, without the concurrence of any person or persons beneficially claiming under his will; and he directed the trustee to stand possessed of the proceeds of such sale, together with the residue of his personal estate, upon trust to pay one moiety of the interest and dividends thereof to his wife during her widowhood, and the other moiety of such interest and dividends (and the whole after his wife's decease or second marriage) to his sister for her life, with remainder as to the whole of the trust-funds to the children of the testator's sister for their lives and the life of the survivor; remainder over. It was held by Sir *James Wigram*, V. C., that the widow was entitled both to her dower and to the benefit given to her by the will. "I take the law," observed his Honor, "to be clearly settled at this day, that a devise of lands eo nomine upon trust for sale, or a devise of lands eo nomine to a devisee beneficially, does not, per se, express any intention to devise the lands otherwise than subject to its legal incidents, that of dower included. There must be something more in the will, something inconsistent with the enjoyment by the widow of her dower by metes and bounds, or the devise standing alone will be construed as I have

stated. The case of *French* v. *Davies*, 2 Ves. jun. 572, is a direct authority for this proposition; and the current of the authorities which are collected in the last edition of Roper's Husband and Wife, vol. i. p. 577, beginning with the leading case of *Lawrence* v. *Lawrence*, down to *Dowson* v. *Bell*, 1 Kee. 761, confirm it. If that be so, it is impossible, in the case of a devise of lands upon trust for sale, that any direction for the application of the proceeds of such sale can affect the case. The devise is of land subject to dower. The trust to sell is a trust to sell subject to dower; and the proceeds of the sale will represent the gross value of the estate, minus the value of the dower. Whatever direction, therefore, for the mere distribution of the proceeds the will may contain, that direction must leave the widow's right to dower untouched. . . . I found myself upon these two propositions: first, that a devise of land upon trusts for sale does not, per se, import an intention to pass the land otherwise than subject to the legal incident of dower; and, secondly, that the direction to divide the proceeds of the sale cannot decide what the subject of sale is; and there is no circumstance affecting the proposition in its application to the present case." See *Gibson* v. *Gibson*, 1 Drew. 42.

It is immaterial, when there is a trust for sale, that there is a direction that the rents and profits are in the mean time to be applied in the same way as the income to arise from the produce of the sale: *Ib.* 57. See also *Bending* v. *Bending*, 3 K. & J. 257.

The gift by the husband of an annuity or rent-charge to the widow, charged upon the property out of which she is at law entitled to dower, is not inconsistent with her claim to dower, and will not consequently of itself alone put her to her election between the annuity or rent-charge and dower. See *Pitts* v. *Snowden*, 1 Bro. C. C. 292, n.; *Pearson* v. *Pearson*, 1 Bro. C. C. 291; *Foster* v. *Cook*, 3 Bro. C. C. 347; *Dowson* v. *Bell*, 1 Kee. 761; *Harrison* v. *Harrison*, 1 Kee. 765; and *Holdich* v. *Holdich*, 2 Y. & C. C. C. 18; *Norcott* v. *Gordon*, 14 Sim. 258, overruling *Arnold* v. *Kempstead*, Amb. 466; *S. C.*, 2 Eden, 236; *Jones* v. *Collier*, Amb. 730; and *Wake* v. *Wake*, 3 Bro. C. C. 255; *S. C.*, 1 Ves. jun. 335. The case of *Villa Real* v. *Lord Galway*, 1 Bro. C. C. 292, n., though sometimes cited as an authority for the proposition, that a widow will be put to her election by the mere gift of a rent-charge or annuity out of the lands of which she is dowable, was decided, it seems, upon the ground that certain directions in the will as to the management of the whole estate, the payment of the annuity, and the accumulation during the minority of a child, were inconsis-

tent with the setting out a third part of the estate by metes and bounds. See *Birmingham* v. *Kirwan*, 2 S. & L. 453; *Roadley* v. *Dixon*, 3 Russ. 202; *Hall* v. *Hill*, 1 D. & W. 103; *S. C.*, 1 C. & L. 129. In *Holdich* v. *Holdich*, 2 Y. & C. C. C. 18, an important case on this subject, Sir *J. L. Knight Bruce*, V. C., after having fully considered all these cases, observes, "I feel bound by the present state of the authorities to say, that a mere gift of an annuity to the testator's widow, although charged on all the testator's property, is not sufficient to put her to her election. I consider myself equally bound by the authorities to say, that a mere gift to the widow of an annuity so charged, and a gift of the whole of the testator's real estate, though specified by name, to some other person, are not together of themselves sufficient to put the widow to her election; and, moreover, that a gift of a portion of the real estate to the widow, whether for life or during widowhood, is not sufficient, as to the residue of the estate, to put the widow to her election in respect of dower." In *Dowson* v. *Bell*, 1 Kee. 761, where a testator gives "all and singular his freehold lands" to trustees upon certain trusts for his children, subject to an annuity, or rent-charge for his wife during widowhood, with power of distress, and he also gives to his wife specific legacies and the residue of his personal estate; it was contended, that the gift of "all" the testator's estates, for the purposes of his will, was inconsistent with the abstraction of one-third of those estates for dower, in addition to the benefits given by the will to the widow, and that the remedy by distress for enforcing payment of the annuity applied to all the testator's lands, and was consequently inconsistent with an intention to devise two-thirds of them. However, Lord *Langdale*, M. R., said, that in the consideration of this question, when a testator speaks of "all his estates," he must be held to mean all his estates subject to the legal rights against them, and amongst them is the wife's right to dower; and that the widow should, therefore, be declared to be entitled both to the annuity and other benefits given to her by the will and to her dower. See also *Thompson* v. *Nelson*, 1 Cox, 447; *Harrison* v. *Harrison*, 1 Kee. 765.

A testator's dealings in his lifetime cannot, it seems, be taken into consideration in construing his will, with reference to the question whether he intended to exclude his wife from her dower, when the will contains no reference to those dealings. Thus, in *Gibson* v. *Gibson*, 1 Drew. 42, where a testator had, before making his will (under which it was argued a case of election arose), sold part of his freehold estate, his wife joining to bar her

dower, and previously and subsequently to the making of his will he had contracted to lease part thereof, and after the date of his will to sell part to the lessee, and after his will he entered into an agreement to let another part of his freeholds, with liberty to the lessee to pull down the buildings and erect others, which agreement after the death of the testator the lessee acted upon, it was held by Sir *R. T. Kindersley*, V. C., that these dealings with the property by the testator could not be taken into consideration by the Court. "The intention," said his Honor, "to exclude the widow's dower, must be collected from the will itself; and the Court cannot, in my opinion, look at the evidence of acts done in the testator's lifetime which are not noticed in the will."

The provisions which have generally been held inconsistent with the widow's legal right to dower, are those which prescribe to the devisees a certain mode of enjoyment, which shows the testator's intention that they should have the entirety of the property. Thus, in *Birmingham* v. *Kirwan*, 2 S. & L. 444, the testator devised his house and demesne to trustees upon trust to permit his wife to enjoy the same for life, she paying 13*s*. yearly for every acre, to keep the house in repair, and not to let, except to the person who should be in possession of the remainder; and he devised the residue of his lands, subject to debts and legacies, to A. for life, remainder to B. in fee. The question was as to the wife's right of dower: first, in the part devised to her; secondly, in the residue. "The result," said Lord *Redesdale*, "of all the cases of implied intention seems to be, that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the land to be set out by metes and bounds. . . . Now, in the present case, it is clear the assertion of a right of dower as to the house and demesne would be inconsistent with the dispositions of the house and demesne contained in the will; and therefore the widow cannot have both. The house and demesne are devised with the rest of the estate to trustees. That devise taken simply might be subject to the widow's right of dower, but it is coupled with a direction that she shall have the enjoyment of the house and demesne, paying a rent of 13*s*. an acre, which must be out of the whole. Then follow directions that she shall keep the house and demesne in repair, that she shall not alien, except to the persons in remainder; directions which apply to the whole of the house and demesne, and could not be considered obligations on a person claiming by dower. It was clearly, therefore, the intention of the testator, that the wife should enjoy the whole of the

house and demesne under a right created by the will; and not a part of it under a right which she previously had, and part under the will. . . . . Then comes the question, whether the implication extends to the rest of the estate? I cannot, on the whole of the case, think the testator has sufficiently manifested an intent that this beneficial interest in the house and demesne, given upon a reserved rent, and under certain conditions, should be considered as a bar of dower out of the rest of the estate. The will may be perfectly executed as to all other purposes without injury to the claim of dower, with respect to the rest of the estate; it may be mortgaged or sold, subject to that claim." And see *Goodfellow* v. *Goodfellow*, 18 Beav. 356; see, however, *Strahan* v. *Sutton*, 3 Ves. 249.

In *Miall* v. *Brain*, 4 Madd. 119, a testator devised all his real and personal estate to trustees upon trust, as to a certain freehold messuage, for his wife during her widowhood, and to pay her, out of the rents and profits, an annuity for life; and upon further trust *to permit his daughter to use, occupy, and enjoy* a certain messuage for her life, and after her decease to raise 2000*l.* for her children; and after giving legacies to his other children, the testator gave the residue of his real and personal estate amongst his children, and gave the usual power of sale to the trustees. Sir *J. Leach*, M. R., held, that the widow was put to her election. "The testator," observes his Honor, "directs the trustees to whom he devises his estates to permit his daughter to use, occupy, and enjoy a certain freehold house for her life. I think the testator contemplated for his daughter the personal use, occupation, and enjoyment of his house; and such personal use, occupation, and enjoyment is inconsistent with the widow's right to dower out of that house. . . . This house is part of a general devise to the trustees of all his real estate, and the testator has not given this house to the trustees free from the widow's dower, unless he has so given his whole real estate. I think the testator has shown a plain intent that the trustees should take an interest in this house which would exclude the widow's dower; and the same intention must necessarily be applied to the whole estate which passes by the same devise." In *Butcher* v. *Kemp*, 5 Madd. 61, where the testator, having devised a freehold farm, containing about 136 acres, to trustees and their heirs, during the minority of his daughter, directed them *to carry on the business of the farm, or let it on lease, during the daughter's minority*, and the testator devised some lands to his widow for her life, and also gave her several specific and pecuniary legacies, Sir *John Leach*, V. C., held, that

the widow was put to her electio .. "The question," said his Honor, "is, whether the testator can be considered as speaking here of his interest in the farm, subject to his widow's claim of dowe into His plain intention is that t. pa rustees should, for the benefit of his daughter, have authority to continue his business in the entire farm which he himself occupied, consisting of about 136 acres; and this attention must be disappointed if the widow could have assigned to her a third part of this land. This case is within the principle of *Miall* v. *Brain*, which was lately before me, in which I held the claim of dower necessarily excluded by the gift of a house for the personal occupation and enjoyment of the testator's daughter." In *Roadley* v. *Dixon*, 3 Russ. 192, where a testator, after bequeathing to his wife an annuity charged on his estate at S., with power of entry and distress, if it should be in arrear for thirty days, and after giving other legacies and annuities, which he charged on his lands at S., in aid of his personal estate, gave and devised all his real and personal property to trustees upon certain trusts; and he directed them *to occupy and manage, during the minority of his son*, a farm, constituting the greater part of his estate at S., and *to let and manage* the residue of the real estates, and to *receive the rents of the whole* of his real estates, Lord *Lyndhurst* held, that the widow was put to her election between her dower and the benefits given to her by the will. "Without meaning to say," observed his Lordship, "that a mere charge of an annuity in favour of the widow, with a clause of entry and distress, would be sufficient to put her to her election; but considering the particular dispositions which the testator has made of his property,—the charge of the annuity, the clause of entry and distress, the express direction for the occupation of part of the estate by the trustees, the trusts declared with respect to the rents, profits, and issues of the whole of the real estate;—taking all these circumstances together, I think it was the manifest intention of the testator that the whole of his property should be free of dower; and that intention is so clear and distinct as to authorise me to say that the widow must be put to her election." In this case the Lord Chancellor acts upon and approves of the rule laid down in *Miall* v. *Brain*, viz., *that where a testator devises the whole of the property together in general terms, and it is manifest that it was his intention that one part of the property should not be subject to dower, it follows that no part of the property should be considered as so subject.* See *Hall* v. *Hill*, 1 D. & W. 94; 1 C. & L. 120; decided, in a great measure, on the ground of a power of leasing,

which applied to the whole property. See also *Reynard* v. *Spence*, 4 Beav. 103; *Taylor* v. *Taylor*, 1 Y. & C. C. C. 727; *O'Hara* v. *Chaine*, 1 J. & L. 662; *Holdich* v. *Holdich*, 2 Y. & C. 22; *Lowes* v. *Lowes*, 5 Hare, 501; *Robinson* v. *Wilson*, 13 Ir. Eq. Rep. 168, 183; *Pepper* v. *Dixon*, 17 Sim. 200; *Grayson* v. *Deakin*, 3 De Gex & Sm. 298; *Parker* v. *Sowerby*, 1 Drew. 488; 4 De Gex, Mac. & G. 321; *Taylor* v. *Linley*, 5 Jur. N. S. (V.-C. S.) 701; *Thompson* v. *Burra*, 16 L. R. Eq. 592; and a direction to cut down timber on any part of the estate would, it seems, be entirely inconsistent with the wife's right to dower. *Ib.* It must be considered that *Warburton* v. *Warburton*, 2 Sm. & Giff. 163 (which seems to proceed upon a misapprehension of the judgment of Lord *St. Leonards* in *Hall* v. *Hill*, 1 Dru. & War. 94), is overruled.

And a widow will be compelled to elect between her freebench in customary lands, and benefits conferred upon her by a will, where the lands out of which she is entitled to freebench were devised to third parties, with powers of management and leasing inconsistent with her enjoyment of freebench, although there was no custom for such lands to be set out for the freebench of a widow by metes and bounds, *Thompson* v. *Burra*, 16 L. R. Eq. 592.

There is another class of cases in which much discussion has arisen, where a testator has devised lands, of which his widow is dowable, to herself and others in equal shares. The first case is that of *Chalmers* v. *Storil*, 2 V. & B. 222. There the words of the will were, "I give to my dear wife A., and my two children B. & C., all my estates whatsoever to be equally divided amongst them whether real or personal." And the testator specified the property bequeathed by him as consisting of freehold ground-rents, money on mortgage, American bank stock, an estate in America, &c. Sir *W. Grant*, M. R., held, that it was a case of election, the claim of dower being directly inconsistent with the disposition of the will. "The testator," observed his Honor, "directing all his real and personal estate to be equally divided, the same equality is intended to take place in the division of the real as of the personal estate, which cannot be if the widow first takes out of it her dower, and then a third of the remaining two-thirds. Further, by describing his English estates he excludes the ambiguity which Lord *Thurlow* in *Foster* v. *Cook*, 3 Bro. C. C. 347, imputes to the word 'my estate,' as not necessarily extending to the wife's dower." As to the last remark being one ground for his Honor's decision, it is clear at the present day, if not in the time of Lord *Thurlow*, that such a devise as "all my English estates" would merely mean and

pass the testator's English estates, subject to dower. See *Read* v. *Crop*, 1 Bro. C. C. 492; *Dowson* v. *Bell*, 1 Kee. 761; *Gibson* v. *Gibson*, 1 Drew. 50. The other and principal ground upon which *Chalmers* v. *Storil* was decided—viz., that equality, which was intended, would be destroyed by letting in the claim to dower—has been followed by subsequent judges. Thus, in *Dickson* v. *Robinson*, Jac. 503, the testator gave his real and personal estate to his wife in trust for the equal benefit of herself and her two daughters. Sir *Thomas Plumer*, M. R., said that he could not distinguish the case from *Chalmers* v. *Storil*. "The substance of the will," said his Honor, "is, that there should be an equal division of the property, which cannot take place if the widow is to have a third. The real and personal estate are united together; the personal estate is not subject to any antecedent claim; and is not the real estate intended to be given in the same manner? The principle certainly is, that the Court will go as far as it can, not to exclude the claim of dower; but here it would be inconsistent with the will." In *Roberts* v. *Smith*, 1 S. & S. 513, the testator, after giving his wife an estate in fee, and certain legacies, devised gavelkind lands, and all other his property of what nature or kind soever, to his wife and two other persons in trust, as to one moiety, for the maintenance of herself and her children by a former marriage, and as to the other moiety, for his children. Sir *J. Leach*, V.-C., held, that the widow was put to her election. "The principle," said his Honor, "referred to in *Chalmers* v. *Storil* decides this case. The plain intention of the testator was, that the wife should have half the income of his property, for the maintenance of herself and her children by her former husband, and that the other half of the income should be applied to the maintenance and education of the testator's own children. That intended equality would be disappointed if the wife were in the first place to take her dower." See also *Reynolds* v. *Torin*, 1 Russ. 129.

Although *Chalmers* v. *Storil* has been so often recognised and followed as an authority, it scarcely seems to have been decided upon correct principles; because when a person devises all his "estates" to his widow and children, "equally to be divided among them," he, according to the ordinary rules of construction, would be held to devise only what belonged to him—viz., the estate subject to the widow's right to dower; and an equal division of the estate after the assignment of the widow's dower by metes and bounds would fully satisfy the words of the will. See 1 Jarm. on Devises, 402; *Ellis* v. *Lewis*, 3 Hare, 315. In a recent case,

Sir *W. Page-Wood*, V.-C., stated that *Chalmers* v. *Storil* is imperfectly reported; see *Bending* v. *Bending*, 3 K. & J. 261.

If a man devises his real estate from his heir after giving his widow a provision in lieu, satisfaction and bar of dower, and the devisee dies in the lifetime of the devisor, the heir will take the estate, but the widow will be obliged to elect. See *Pickering* v. *Lord Stamford*, 3 Ves. 337. But a gift by a testator to his widow in lieu of thirds of his personal property, does not preclude her from claiming her share of the personalty under the Statute of Distributions (22 & 23 Car. 2, c. 10) in the event of the failure of a bequest of that property. Thus, in *Pickering* v. *Lord Stamford*, 3 Ves. 492, where a testator gave part of his real and personal property to his wife in lieu of dower or thirds, which she could claim out of his real or personal estate, or either of them, and bequeathed the residue of his personal estate (part of which consisted of real securities) to his executors, for charitable purposes, which bequest was of course void as to the real securities; it was held by Lord *Loughborough*, affirming the decision of Lord *Alvanley*, M. R. (3 Ves. 332), that the widow was not barred by the clauses in the will. His Lordship observed, —"Neither an heir-at-law, nor by parity of reasoning next of kin, can be barred by anything but a disposition of the heritable subject or personal estate to some person capable of taking. Notwithstanding all the words of anger and dislike applied to the heir, he will take what is not disposed of. It is impossible to make a different rule as to personal estate, with regard to what is not disposed of. Here is a legal intestacy, for the gift to the charity is void at law. Being a legal intestacy, I am to control the Statute of Distributions (22 & 23 Car. 2, c. 10). How can the Court possibly do that? I must close the will, and cannot look at it." See *Sympson* v. *Hornsby*, cited 3 Ves. 335; *Wetherell* v. *Wetherell*, 4 Giff. 1. But it seems that the principle of the decision in *Pickering* v. *Stamford* will not apply to a case where, on the face of the will, there is an intestacy as to a great part of the estate: *Lett* v. *Randall*, 3 Sm. & G. 83, 91, n.

A provision made for a wife, by a rent-charge "for her jointure, and in lieu of dower and thirds at common law," does not extend to her share of the personal estate under the Statute of Distributions: *Colleton* v. *Garth*, 6 Sim. 19. But the addition of the words "out of any real or personal estate" has been held to do so (*Gurly* v. *Gurly*, 8 C. & F. 743; and see *Thompson* v. *Watts*, 2 J. & H. 291): and the words "in lieu of dower or thirds at common law, or *otherwise*," have been held to extend to a wife's freebench in

copyholds: *Nottley* v. *Palmer*, 2 Drew. 93.

With regard to widows married since the 1st January, 1834, questions of election will less frequently arise, as dower may now be much more readily barred by the husband. See the Dower Act (3 & 4 Will. 4, c. 105), ss. 4, 5, 6, 7, and 8.

And a devise of land by a man married after the Dower Act (3 & 4 Will. 4, c. 105) came into operation, will, in the absence of a contrary intention declared by the will, deprive her of dower. See Sect. 9, which enacts, "that where a husband shall devise any land out which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will." In *Rowland* v. *Cuthbertson*, 8 L. R. 466, a testator, after directing his debts to be paid by his executors, devised his real and personal estate, subject as aforesaid, to trustees upon certain trusts, being partly for the benefit of his widow. It was held by Lord *Romilly*, M. R., that the widow was deprived of her dower by sect. 9 of the Dower Act. "I thought it desirable," said his Lordship, "to reserve my judgment in order that I might refer to some of the cases decided before the Act (of which *Lawrence* v. *Lawrence*, 3 Bro. P. C. 483, may be taken as an example), by which it was settled that where a man devises all his estate, that does not dispose of the wife's dower, but means the estate subject to dower. I think, however, that the Act was intended to make a difference in that respect. . . . Certainly there is no indication of a contrary intention, and I am of opinion that there is no dower." See also *Laccy* v. *Hill*, 19 L. R. Eq. 346, and the remarks therein on some of the dicta of Lord *Romilly*, M. R., in *Rowland* v. *Cuthbertson*.

By the 10th section of the Dower Act (3 & 4 Will. 4, c. 105) it is enacted, "that no gift or bequest made by any husband to or for the benefit of his widow, of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower unless a contrary intention shall be declared by his will."

If a testator, having an undivided interest in a particular property, devises that property *specifically*, to his co-owner, a case of election arises, and the devisee must elect between his own interest in the property and the interest he takes under the will. But if the testator does not dispose of it specifically, but by general words, such as "all my lands and hereditaments," or the like, no case for election arises,

because there is other property of the testator's sufficient to satisfy the devise itself. Thus in *Miller* v. *Thurgood*, 33 Beav. 496, a testator had a freehold in Potter Street and a freehold in South Street, and he was entitled to two-thirds of a house and eighteen freehold cottages in South Street, the other one-third belonging to his wife. By his will he devised all his freehold messuages, cottages, &c., in the two streets, to his wife for life, she keeping them in tenantable repair, and after her decease upon trusts to sell and divide the proceeds amongst his children. It was held by Sir *John Romilly*, M. R., that the wife was bound to elect between her one-third of the house and cottages and the other benefits given to her by the will. "If," said his Honor, "the testator had devised his property in these terms, 'all and every my freeholds in Potter Street and South Street and elsewhere, with the appurtenances,' I should be of opinion that no case for election arose. But he specifically points to his 'cottages' in South Street, and that being so, I am of opinion that these words can only refer to the messuage and eighteen cottages of which he had only two-thirds, and consequently I am of opinion that a case for election arises."

If a person comes in directly under a settlement, and asks to have the benefit of such of its provisions as give him an advantage, and at the same time claims adversely to what was intended to be the rest of the settlement, because it was not binding, then a case of election arises. Thus, *Brown* v. *Brown*, 2 L. R. Eq. 481, marriage articles executed when the lady was a minor, contained a covenant by the husband to settle her interest in real and personal estate, including after-acquired property, on the usual trusts; and she died without having confirmed the articles, leaving her husband surviving, and an only child, her heiress-at-law, who claimed an interest under the articles in the personal estate, and also claimed the real estate attempted to be settled as heiress-at-law of her mother. It was held by Lord *Romilly*, M. R., that the heiress-at-law was put to her election whether she would take under or against the settlement. "In the present case," said his Lordship, "the plaintiff comes in and claims directly under the limitation of the personal estate for her benefit under the settlement, and claims the real estate adversely to the settlement on the ground that in the event the settlement did not bind it. I think, therefore, that she claims beneficially under the settlement directly, and that consequently she must elect whether she will take adversely to it or under it; if the latter, she must give effect to the whole of it as far as she can." And see also *Anderson* v. *Abbott*, 23

Beav. 457; *Willoughby* v. *Middleton*, 2 J. & H. 344, 8 L. R. Ch. App. 590; *Codrington* v. *Lindsay*, 8 L. R. Ch. App. 578; *S. C.*, nom. *Codrington* v. *Codrington*, 7 L. R. Ho. Lo. 854.

Where, however, a person, as, for instance, an heir-at-law of an infant, claims property as not being bound by a settlement made by the infant, if he has no benefit, and claims none under the settlement, he may assert his right, there being no case of election (*Campbell* v. *Ingilby*, 21 Beav. 567; 1 De G. & Jo. 393: but see this case quoted 8 L. R. Ch. App. 593); and he is entitled to do this, though it may be, from extraneous circumstances, and by some separate and independent cause, he has obtained some benefit under the settlement. Per Lord *Romilly*, M. R., in *Brown* v. *Brown*, 2 L. R. Eq. 485.

The doctrine of election is not applicable to creditors taking the benefit of a devise for the payment of debts, and also enforcing their legal right against other funds disposed of by the will: *Kidney* v. *Coussmaker*, 12 Ves. 136. See also *Clark* v. *Guise*, 2 Ves. 617. In *Deg* v. *Deg*, 2 P. Wms. 412, 418, where a father devised his own estate and an estate of his son's for the payment of debts, the son was allowed as a creditor of his father to share with the other creditors in the benefit conferred upon them by the provision for payment of debts, without being obliged to give up his own estate. But these questions will not arise often now, as real estates are liable to the payment of debts by simple contract as well as specialty. See 3 & 4 Will. 4, c. 104.

A devise of an estate does not, per se, import an intention to devise it free from incumbrances to the devisee, so as to put the incumbrancers taking benefits under the will to their election (*Stephens* v. *Stephens*, 1 De G. & Jo. 62; 3 Drew. 697); the intention to do so must appear conclusively from the words of the will: *Sadlier* v. *Butler*, 1 I. R. Eq. 415, 423.

A person will not be obliged to elect between benefits conferred upon him by an instrument, and an interest which he takes derivatively from another, who has elected to take in opposition to the instrument. Thus it was held, that a husband might be tenant by the curtesy of an estate-tail, which his wife had elected to take in opposition to a will, under which he had accepted benefits: *Lady Cavan* v. *Pulteney*, 2 Ves. jun. 544; 3 Ves. 384.

Nor will a person be compelled to elect between a benefit conferred upon him by an instrument, and an interest which he took adversely to the instrument and derivatively from the real owner, who took no benefit thereunder. Thus, in *Grissell* v. *Swinhoe*, 7 L. R. Eq. 291, a testator being entitled under a settlement, subject to a

life interest, to a moiety of a fund of 25,300 rupees, by his will, after reciting erroneously that he was under the settlement, "subject to the trusts therein contained," entitled to the said sum of 25,300 rupees, he bequeathed the whole of the said sum of rupees in equal moieties, viz., one moiety to H. Swinhoe, whose wife was really entitled under the settlement to one moiety, and the other moiety to his daughter, Charlotte. Mrs. H. Swinhoe died, and her husband took out letters of administration to her estate and effects. It was held by Sir *W. M. James*, V.-C., that H. Swinhoe was not bound to elect between the legacy and the moiety of the fund which he took as administrator of his wife. "I am of opinion," said his Honor, "that no case of election arises, because the gift is to H. Swinhoe in his own right, and the claim is by him as the representative of Mrs. Swinhoe. True it is that the representative of Mrs. Swinhoe being her husband, would be entitled to the ultimate surplus, whatever that may be, of that which he took as her personal estate. But that is a mere incident to her estate. The result will be that the fund is divisible in fourths; three-fourths going to Henry Swinhoe, and the remaining fourth to the plaintiff." See the remarks on this case in *Cooper* v. *Cooper*, 6 L. R. Ch. App. 21. Now it is presumed that if in this case, before the death of the testator, H. Swinhoe had, by his wife's death, and by taking out letters of administration to her, become the real owner of her share in the 25,300 rupees before the death of the testator, he would have been compelled to elect, and would consequently only have been entitled to a moiety. This it seems is the effect of the recent decision of *Cooper* v. *Cooper*, 6 L. R. Ch. App. 15; there a lady having a power of appointment during a limited time in favour of any of her issue over (amongst other property) the proceeds of an estate, called Pain's Hill, directed to be sold, made within that time an appointment by deed which included such proceeds, in favour of all her three children, reserving a power of revocation and new appointment. The lady survived the time during which she could exercise the power: and after her death, it appeared, that by her last will and testament in writing "she gave and appointed" Pain's Hill to her eldest son absolutely, and by a subsequent codicil she gave her residuary property to her three sons equally; and afterwards, upon the death of Roland Edward, one of her sons, by another codicil, she gave to his children two-thirds of the share of the residuary estate, intended for him, and the other one-third of that share to her two surviving sons. The gift and appointment

by her will of the Pain's Hill estate being held inoperative, the proceeds of Pain's Hill belonged, under the appointment by deed, to the two surviving sons, and the children of the deceased son. Upon a bill, filed by the eldest son, it was held by the Lords Justices, reversing the decision of Sir *John Stuart*, V.-C., that not only the surviving younger son but also the children of his deceased brother, Roland Edward, were put to their election to take, either under or against the will and codicils, that is, that they were bound, either to allow the whole of the proceeds of Pain's Hill to go according to the will to the eldest brother, or to give up to the extent of compensating him the other benefits provided for them by the will and codicils. "What was pressed upon us," said Lord Justice *James*, "was this: that the children of Roland Edward were not the owners of one-third of Pain's Hill, within the meaning of the rule; but what they were entitled to was not Pain's Hill or any part of Pain's Hill in specie, but a share of the ultimate residue, whatever that might be, of the entire personal estate of the intestate, in a due course of administration; that it vested not in them, but in Roland Edward's estate, and that their share was an incident to that estate. In support of that contention, a decision of mine, when Vice-Chancellor, was much pressed upon us: *Grissell* v. *Swinhoe* (7 L. R. Eq. 291); but the decision there, whether right or wrong, proceeded on the assumption that the legatee's title to the property did not exist at the death, but was a derivative title, through the title of another person who was the true owner at the death; just as if in this case the children of Roland Edward had been the objects of the testatrix's bounty, and Roland Edward had survived the testatrix, and afterwards the children had succeeded beneficially to his estate, including his share of the proceeds of Pain's Hill." This decision was afterwards affirmed with slight variations by the House of Lords. See 7 L. R. Ho. Lo. 53. See also *Brodie* v. *Barry*, 2 V. & B. 127.

A person entitled in remainder, to an interest in property, is not bound by the election of a person having a prior interest: *Ward* v. *Baugh*, 4 Ves. 623; *Long* v. *Long*, 5 Ves. 445. See also *Hutchison* v. *Skelton*, 2 Macq. H. L. Cas. 492, 495. So, likewise, every member of a class, as, for instance, next of kin, has a distinct right to elect, and will not be bound by the election of the majority: *Fytche* v. *Fytche*, 7 L. R. Eq. 494.

Privileges of persons compelled to elect.]—Persons compelled to elect are entitled previously to ascertain the relative value of their own property, and that conferred upon them, and time will be al-

lowed to them for that purpose: (*Newman* v. *Newman*, 1 Bro. C. C. 186; *Wake* v. *Wake*, 3 Bro. C. C. 255; 1 Ves. jun. 335; *Chalmers* v. *Storil*, 2 V. & B. 222; *Hender* v. *Rose*, 3 P. Wms. 124, n.; *Whistler* v. *Whistler*, 2 Ves. jun. 367, 371; *Codrington* v. *Lindsay*, 8 L. R. Ch. App. 593;) and, if necessary, accounts will be directed to be taken. Thus in *Boynton* v. *Boynton*, 1 Bro. C. C. 445, although Lady Boynton had by her answer elected to take her dower, instead of the benefit given to her by her husband's will, Sir *Thomas Sewell*, M. R., declared on the hearing, that as no account of the testator's personal estate and of his debts had been taken, she was not obliged to make any election until the account should be taken, and it should appear out of what real estate she was dowable at the time of the testator's decease; and it was referred to the Master to take an account of the personal estate, and also to state out of what estate she was dowable.

As to the apportionment of debts upon different funds, see *Cooper* v. *Cooper*, 6 L. R. Ch. App. 15.

A person compelled to elect may in general file a bill to have all necessary accounts taken (*Butrieke* v. *Brodhurst*, 3 Bro. C. C. 88; 1 Ves. jun. 171; *Pusey* v. *Desbouvrie*, 3 P. Wms. 315); but a bill is not always necessary for this purpose, as the Court may, when there is a cause in existence relating to the same matter, direct such inquiries as may be necessary to guide the person put to his election in exercising it: *Douglas* v. *Douglas*, 12 L. R. Eq. 617. And an election made under a mistaken impression will not be binding, for in all cases of election the Court, while it enforces the rule of equity, that the party shall not avail himself of both his claims, is anxious to secure to him the option of either, and not to hold him concluded by equivocal acts, performed, perhaps, in ignorance of the value of the funds: *Pusey* v. *Desbouvrie*, 3 P. Wms. 315; *Wake* v. *Wake*, 3 Bro. C. C. 255; *Kidney* v. *Coussmaker*, 12 Ves. 136; *Dillon* v. *Parker*, 1 Swanst. 381, and note.

Although before an heir can be put to his election he is entitled to know everything which concerns the situation and the value of the property in reference to which he may be required to make his election, there is no authority for the proposition that where an heir has chosen deliberately to confirm a devise of lands, which, without his confirmation, would be invalid, there must be, in order to enable the Court to hold that those claiming under him are bound by his confirmation, some distinct evidence of his knowledge of his rights. *Dewar* v. *Maitland*, 2 L. R. Eq. 838.

What will be considered as an election.]—Election is either *ex-*

press (about which it is unnecessary to say anything) or *implied*. And here considerable difficulty often arises in deciding what acts of acceptance or acquiescence amount to an implied election; and this question, it seems, must be determined more upon the circumstances of each particular case, than upon any general principle.

On a question of election by a party bound to elect between two properties, it is necessary to inquire into the circumstances of the property against which the election is supposed to have been made; for if a party so situated, not being called on to elect, continues in the receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take the one and reject the other; and, in like manner, if one of the properties does not yield rent to be received, and the party liable to elect deals with it as his own,—as, for instance, by mortgaging it (particularly if this be done with the knowledge and concurrence of the party entitled to call for an election),—such dealing will be unavailable to prove an actual election as against the receipt of the rent of the other property: *Padbury* v. *Clark*, 2 Mac. & G. 298; and see *Morgan* v. *Morgan*, 4 Ir. Ch. Rep. 606, 614. As we have before seen, any acts, to be binding upon a person, must be done with a knowledge of his rights. They must also be done with the knowledge of the right to elect: (*Briscoe* v. *Briscoe*, 7 Ir. Eq. R. 123; 1 Jo. & L. 334; *Sweetman* v. *Sweetman*, 2 I. R. Eq. 141,) and with the intention of electing: *Stratford* v. *Powell*, 1 Ball & B. 1; *Dillon* v. *Parker*, 1 Swanst. 380, 387; *Edwards* v. *Morgan*, M'Clell. 541; 13 Price, 782; 1 Bli. N. S. 401; *Worthington* v. *Wiginton*, 20 Beav. 67; *Wintour* v. *Clifton*, 21 Beav. 447, 468; 8 De G. Mac. & G. 641; *Campbell* v. *Ingilby*, 21 Beav. 582; *Wilson* v. *Thornbury*, 10 L. R. Ch. App. 239.

It is difficult to lay down any rule as to what length of time, after acts done by which election is usually implied, will be binding upon a party, and prevent him from setting up the plea of ignorance of his rights. In *Wake* v. *Wake*, 1 Ves. jun. 335, it was held that three years' receipt of a legacy and annuity, under a will by a widow in ignorance of her rights, did not preclude her from making her election; in *Reynard* v. *Spence*, 4 Beav. 103, where a widow had received an annuity for five years, it was held, she had not elected. See also *Butricke* v. *Brodhurst*, 3 Bro. C. C. 90; *S. C.*, 1 Ves. jun. 172; *Dillon* v. *Parker*, 1 Swanst. 386; and in *Sopwith* v. *Maugham*, 30 Beav. 235, where a widow had for sixteen years enjoyed a provision under a will in ignorance of her right to dower, in express satisfaction of which the provi-

sion was made for her, she was held not to have elected.

But a person may by his acts suffer specific enjoyment by others until it becomes inequitable to disturb it: *Tibbits* v. *Tibbits*, 19 Ves. 663; *Dewar* v. *Maitland*, 2 L. R. Eq. 834.

Acts of implied election which will bind a party will also bind his representatives; (*Earl of Northumberland* v. *Earl of Aylesford*, Amb. 540, 657; *Dewar* v. *Maitland*, 2 L. R. Eq. 834. See also 2 Ves. 525; *Stratford* v. *Powell*, 1 Ball & B. 1; *Ardesoife* v. *Bennett*, 2 Dick. 463;) and some acts, which it appears would not be binding upon him if insisted upon in his lifetime, will bind his representatives "upon that principle only," as observed by Lord *Hardwicke*, "not to disturb things long acquiesced in in families, upon the foot of rights which those, in whose place they stand, never called in question:" *Tomkyns* v. *Ladbroke*, 2 Ves. 593; *Worthington* v. *Wiginton*, 20 Beav. 67: *Sopwith* v. *Maugham*, 30 Beav. 235, 239; *Whitley* v. *Whitley*, 31 Beav. 173.

But if the representatives of those who were bound to elect, and who have accepted benefits under the instrument imposing the obligation of election, but without explicitly electing, can offer compensation, and place the other party in the same situation as if those benefits had not been accepted, they may renounce them and determine for themselves: *Dillon* v. *Parker*, 1 Swanst. 385; *Moore* v. *Butler*, 2 S. & L. 268; *Tysson* v. *Benyon*, 2 Bro. C. C. 5.

If election be doubtful it may be sent to a jury to determine that fact: *Roundell* v. *Currer*, 2 Bro. C. C. 73; 1 Swanst. 383 n.

The case of *Harris* v. *Watkins*, 2 K. & J. 473, seems to have been decided scarcely in accordance with the principles deducible from the authorities. There a testator devised his residuary, real, and personal estate to his wife "in lieu and discharge of all money which he had borrowed out of and forming part of the trust moneys mentioned in the settlement made on his marriage with her," and he made his wife executrix. She died three days after the testator, and without having possessed herself of any of his real or personal estate. On the testator's death the widow became entitled to the trust moneys under the settlement absolutely. The evidence as to the relative value of the property given to the widow by the will, and the money which she would be entitled to out of her husband's estate in payment of the trust moneys borrowed by him, seems to have been involved in much obscurity. It was held by Sir *W. P. Wood*, V.-C., that the Court could not presume a disclaimer by the widow, and consequently that her heir was entitled to the devised estate, and the debts claimed by her administrator as due to her from the tes-

tator were discharged. His Honor thought it was not so much whether the Court would presume election, as whether it would presume a rejection of the devise. That there was no evidence as to any disclaimer, and that the only question was whether, having regard to the circumstances of the devisee's death, and to the relative values of the estate devised and of the debts to be discharged, the Court was called upon to presume a disclaimer. "Whether," his Honor added, "circumstances might not exist under which the Court would be justified in presuming a disclaimer, is a question of some nicety. I am not aware of any authority upon the point; but I apprehend that in a strong case,—for instance, if a testator devised real estate worth 10,000*l.* only, and declared that it should be taken in lieu and discharge of debts to the amount of 20,000*l.*, in such a case, it being manifest that it would be to the disadvantage of the devisee to retain the estate upon the terms mentioned in the will, the Court, in the event of the devisee dying under circumstances like the present, would, as between his real and personal representatives, struggle hard to presume a disclaimer; but where it is not manifest that it would be for the advantage of the devisee to retain the estate upon the terms proposed by the testator, the ground of that presumption fails, and the presumption does not arise."

Where an infant is bound to elect, in some instances, as in *Streatfield* v. *Streatfield*, the period of election is deferred until after the infant comes of age. See *Boughton* v. *Boughton*, 2 Ves. 12; *Bor* v. *Bor*, 3 Bro. P. C. 173, Toml. Ed. In other cases there has been a reference to inquire what would be most beneficial to the infant: *Chetwynd* v. *Fleetwood*, 1 Bro. P. C. 300, Toml. Ed.; 2 S. & L. 266; *Goodwyn* v. *Goodwyn*, 1 Ves. 228; *Bigland* v. *Huddleston*, 3 Bro. C. C. 285, n.; *Gretton* v. *Haward*, 1 Swanst. 413; *Ebrington* v. *Ebrington*, 5 Madd. 117; *Ashburnham* v. *Ashburnham*, 13 Jur. 1111; *Prole* v. *Soady*, 8 W. R. (V.-C. S.) 131; *Brown* v. *Brown*, 2 L. R. Eq. 481; and see *Griggs* v. *Gibson*, 1 L. R. Eq. 685; Seton, 495, 3rd ed. In others an order has been made for an infant to elect without a reference to Chambers: *Blunt* v. *Lack*, 26 L. J. Ch. 148; *Lamb* v. *Lamb*, 5 W. R. (V.-C. K.) 772: Seton, 260, 261, 3rd ed.

The practice as to election by married women in the Court of Chancery also varies; see Mr. Swanston's note to *Gretton* v. *Haward*, 1 Swanst. 413; but in general there will be an inquiry what is most beneficial for them, and they will be required to elect within a limited time. See *Pulteney* v. *Darlington*, 7 Bro. P. C. 546, 547, Toml. Ed.; 2 Ves. jun. 560; 3 Ves. 385; *Vane* v. *Lord Dungannon*, 2 S. & L. 133; *Davis* v. *Page*, 9 Ves. 350; *Cooper* v.

Cooper, 7 L. R. Ho. Lo. 53, 67, 79. In *Wilson* v. *Lord John Townsend*, 2 Ves. jun. 693, Lord *Rosslyn*, although he admitted that to be the general practice, dismissed the bill without a reference, as the married woman "had manifestly a much better interest than the testatrix intended." See also *Parsons* v. *Dunne*, 2 Ves. 60, Belt's Suppl. 276.

A married woman may elect so as to effect her interest in real property; and where she has once so elected, though without deed acknowledged, the Court can order a conveyance accordingly; the ground of such order being that no married woman shall avail herself of a fraud. Having elected, she is bound, and the transaction will be enforced against the heir: *Ardesoife* v. *Bennet*, 2 Dick. 463; *Barrow* v. *Barrow*, 4 K. & J. 409; *Willoughby* v. *Middleton*, 2 J. & H. 344; *Sisson* v. *Giles*, 11 W. R. (V.-C. S.) 558; *Savill* v. *Savill*, 2 Coll. 721; *Anderson* v. *Abbott*, 23 Beav. 457; *sed vide Campbell* v. *Ingilby*, 21 Beav. 567; which may be considered as contrary to the current of authorities on this point. Lord *Cottenham*, however, was of opinion in the case of *Frank* v. *Frank*, 3 My. & Cr. 171, that a feme covert was not competent during the coverture to elect between a jointure made to her after her marriage and her dower at common law, because there is an express provision in the Statute of Uses (27 Hen. 8, c. 10), that her election shall be made at the time when the right is claimed, that is to say, after her husband's death; sec. 10. See also *Anon.*, Dyer, 358, b.

Ordinarily a married woman cannot elect to relinquish a reversionary chose in action: *Robinson* v. *Wheelwright*, 6 De G. Mac. & G. 535, 546; *Whittle* v. *Henning*, 2 Ph. 731; *Williams* v. *Mayne*, 1 I. R. Eq. 519, overruling *Wall* v. *Wall*, 15 Sim. 513. But see now 20 & 21 Vict. c. 57, fully noticed in the note to *Ryall* v. *Rowles*, vol. ii. *post*.

It would seem, however, that upon principle a married woman, in the case of a reversionary interest in personalty, equally as in the case of real property (at any rate where under Malin's Act (20 & 21 Vict. c. 57), she has power to dispose, in manner therein mentioned, of such reversionary interest) would not be allowed to avail herself of a fraud, and might therefore be held to have made her election even when such reversionary interest in personalty was thereby effected. See, however, *Williams* v. *Mayne*, 1 I. R. Eq. 519.

A person who does not elect within the time limited will be considered as having elected to take against the instrument putting him to his election. See the decree in *Streatfield* v. *Streatfield*, 1 Swanst. 447.

Parties disappointed by the election of the heir to take against a

will, by requiring the executors to complete a contract for an estate entered into by the testator, have no lien on the estate for the amount of the benefits the heir has taken under the will, but after his death they are entitled to prove against his estate for the amount which he has so received: *Greenwood* v. *Penny*, 12 Beav. 402.

It may be here mentioned that under the Legacy Duty Acts (36 Geo. 3, c. 52, and 45 Geo. 3, c. 28), no legacy duty is payable on the value of personal estate given up by one legatee to another person under the doctrine of election; but where a testator devises his own real estate to one person, and bequeaths a sum of money belonging to such person to a third party, legacy duty will be payable on such sum as being in effect payable out of or charged upon the testator's real estate: *Laurie* v. *Clutton*, 15 Beav. 131.

It seems, however, that in the former of these cases succession duty would be payable, by the person to whom the personal estate is given up, as upon a succession derived by him from the testator, within the terms of sect. 2 of the Succession Duty Act (16 & 17 Vict., c. 51). See Hanson on Probate, Legacy, and Succession Duties, pp. 6, 8, 3rd ed.; and in the latter of these cases the devisee of the real estate would, after the legacy duty has been paid upon the sum so in effect charged upon the devised estate, be entitled to a corresponding deduction from the value of his succession: *Ib.* 131.

ALEYN *v.* BELCHIER.

July 5th, 1758.

[REPORTED 1 EDEN, 132.]

S.C. Sugd. on Pow. App. Amb. MSS. Reg. Lib. A. 1757, fol. 432.

FRAUD UPON A POWER.]—*Power of jointuring executed in favour of a wife, but with an agreement that the wife should only receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts: held a fraud upon the power, and the execution set aside, except so far as related to the annuity; the bill containing a submission to pay it, and only seeking relief against the other objects of the appointment.*

THE Rev. Thomas Aleyn being seised of a real estate in Essex, of the yearly value of 540*l.*, subject to a mortgage for a term of 500 years to Sir Charles Palmer for 500*l.*, and having a nephew, Edmund Aleyn, and two brothers, the plaintiff, Giles Aleyn, and William, who was a defendant, by his will, bearing date the 28th of May, 1746, devised the same to Eyre and Bragg in trust by sale or mortgage to raise money, and pay his debts and legacies, and to permit his wife to receive the rents and profits of the residue for her life, and after her death in trust to convey to his nephew Edmund for life, with remainder to his first and other sons in tail male, with proper limitations to support contingent remainders, with *a power to his nephew to make a jointure on any woman he should then after marry, for her life, in bar of dower*, with powers to provide for younger children, and to make leases, with remainder to the testator's brother Giles for life; remainder to his first and other sons in tail male; remainder to his brother William for life; remainder to his first and other sons in tail male; remainder to his

own right heirs: he gave his brother, the plaintiff, an annuity of 30*l.* a year for his life, to be paid out of his estate, to be increased to 50*l.* a year in case his nephew should survive his, the testator's wife.

A bill was filed soon after the testator's death by the widow, and on the 14th of February, 1749, a decree made to establish the will, and for payment of debts and legacies by mortgage or sale in the usual way. The master reported, there was due for debts and legacies 1516*l.* 1*s.* 10*d.* which he approved to be raised by mortgage. The widow died in April, 1750, and Edmund became entitled to the possession of the estate. The defendant, William Belchier, having advanced money to pay off the incumbrances, a mortgage, bearing date the 26th and 27th of June, 1750, was made of the estate to him in fee, and the term for years was assigned to John Belchier in trust for W. Belchier.

Edmund was very extravagant, and became indebted to William Belchier in the sum of 1760*l.*

On the 4th of June, 1750, Edmund married the defendant Jane, who was a low woman without fortune, and no provision for her was either made or agreed to be made; but, soon after the marriage, by articles of agreement, bearing date the 1st of August, 1750, and made between Edmund Aleyn and his wife of the one part, and William Belchier of the other, reciting the will of Thomas Aleyn, giving Edmund a power of jointuring, and that he and Jane were lately married, and that he was indebted to William Belchier in the sum of 1760*l.*, besides the mortgage, Edmund Aleyn, in satisfaction and discharge of the said sum of 1760*l.*, and in consideration of the several annuities and money thereinafter agreed to be paid, covenanted within six months to procure an effectual conveyance and settlement to be made by the trustees in Thomas Aleyn's will, and immediately after such settlement should be made, to appoint the whole estate to his wife for her life, in case she should survive him, for her jointure; and that he and his wife, as soon as they should become respectively seised of the legal estate of freehold,

would, by fine and conveyances, convey and assure all the said premises by the said will devised and intended to be settled, unto and to the use of William Belchier, his heirs and assigns, during the lives of Edmund Aleyn and Jane his wife, and the longer liver of them; and in consideration thereof, William Belchier covenanted that, in case the said settlement should be perfected, whereby the estate should become well vested in him and his heirs, for the lives of Edmund and Jane his wife, and the longer liver of them, to pay the several annuities after mentioned, namely: to Jane Aleyn, during the joint lives of her and Edmund her husband, 60*l.* a year, clear of all deductions, for her separate use; to Edmund Aleyn, for his life, in case he should survive Jane his wife, 60*l.* a year, clear of all deductions; and to Jane, in case she should survive Edmund her husband, for her life, 100*l.* a year, clear of all deductions; and to pay to John Miles, son of Jane by a former husband, 105*l.* at the age of twenty-one years; and also to pay Jane 5*l.* yearly towards his maintenance and education, till the 105*l.* should become payable.

The estate was conveyed by lease and release of 6th and 7th of August, 1750, to the uses of Thomas Aleyn's will, pursuant to the decree; and by deed, dated 8th August, 1750, reciting the conveyance and power to jointure, Edmund Aleyn, in consideration of the marriage, and in order to make a provision for Jane, his wife, appointed the whole estate to Jane, his wife, for a jointure, subject to the payment of the annuities given by the will of Thomas Aleyn, and of the mortgage of 1516*l.* 1*s.* 10*d.* and interest.

On the 10th of August, 1750, Edmund Aleyn and Jane, his wife, executed a deed, by which Edmund covenanted with George Townsend, that he and his wife would levy a fine of the premises to Townsend and his heirs, for and during the lives of Edmund and his wife, and the longer liver of them, in trust for William Belchier and his heirs, which was levied accordingly.

William Belchier took possession of the estate, and

received the rents and profits, and paid the plaintiff, during Edmund's life, two sums of 25*l.* and 21*l.* 5*s.*, in part of the annuity he was entitled to under Thomas Aleyn's will.

Edmund died in June, 1755.

On 26th November, 1756, the plaintiff filed the present bill to redeem the estate, on payment of 1516*l.* 1*s.* 10*d.*, the mortgage money borrowed under the decree, and to be let into the possession of the estate; for an account of the rents and profits from the death of Edmund, submitting to pay Jane 100*l.* a year for her life, and to have the deeds and writings of the estate delivered up.

Jane Aleyn and William Belchier admitted, in their several answers, the facts as before stated. Jane Aleyn said, that the settlement was intended to make a reasonable provision for her, and to save Edmund from ruin; and that if Edmund had not been in debt at the time of their marriage, he would have settled the whole estate on her for her jointure. William Belchier said, that the consideration of the settlement and conveyance was truly and bonâ fide advanced, part before the execution of the settlement, and the remainder at or about the time of the execution of the settlement and conveyance to Townsend; and they both admitted that Edmund was, at the time of the settlement, in distressed circumstances, and in want of money.

Mr. *Perrot* and Mr. *Ambler*, for the plaintiff:—This is an improper execution of the power, which was to bar dower by giving a jointure; but even supposing it well executed, the fraud will vitiate it. The appointment and conveyance were a deceit upon the testator, and a fraud upon the remainder-man. The power given to the nephew, who was only tenant for life, was to make a fair jointure, to encourage him to marry, not to pay his debts. The remainder-man was only to be kept out of the estate in case a fair and honest jointure were made. It must not be colourable, and for other purposes. This was an artful contrivance of Belchier and the defendant Jane: a low, mean woman, of no fortune. There is no settlement, nor agreement for one, at the time of the marriage, nor

till Belchier put it into Edmund's head, with a view to secure his own debt by taking an absolute interest in the estate for two lives, instead of a mortgage for Edmund's life only. It is at best an unreasonable bargain. The articles of the 1st August discover the whole scheme. Upon the face of them it appears it was not the intention to jointure, but to pay debts. The only jointure averred is 100*l.* a-year; Edmund is stripped of everything during the joint lives of himself and his wife; only 60*l.* a-year to be paid during their joint lives, and that to the separate use of the wife. Suppose a power to make a jointure of so much for every thousand pounds fortune: it has been repeatedly held, that if the husband or others advance a sum of money, colourably to authorise the husband to settle largely, a Court of Equity will set aside all above the proportion of the real value of the fortune (*a*). So, if a father, having a power to appoint amongst his children, bargains with one for a share, equity will set it aside. Though it may be honest in Edmund to pay his debts, it must be done with his own money; this is a method of doing it with other persons' money, contrary to the intention of the testator. Even admitting the estate had been fairly and bonâ fide appointed as a jointure, and the wife had afterwards parted with her jointure, or part of it to pay her husband's debts, it would have been good to bind the remainder-man; yet in this case the whole is one transaction, a collusion between the husband and wife and Belchier. The case of *Lane* v. *Page*, determined by Lord *Hardwicke*, is precisely in point.

(*a*) *Lane* v. *Page*, Amb. 233; *Lord Tyrconnel* v. *Duke of Ancaster*, Amb. 237.

The Attorney-General, Sir *Charles Pratt*, and the Solicitor-General, the Hon. *Charles Yorke*, for the defendant Belchier; *Clark*, for the jointress:—

The first question is, as to the extent of the power given by the will. The objection that the power is only to bar dower, and consequently can only comprehend jointures made before marriage, is too extensive, as it will comprehend every jointure, though made bonâ fide. The devise is to a nephew, having no estate of his own, for life, without impeachment of waste; he had no estate to

which dower could attach, which shows that the words were put in by the scrivener currente calamo.

As to the execution, the power was substantially executed; the husband and wife agreed to sell their interest to Belchier. If an appointment had been made of the whole estate, and the wife had afterwards joined with the husband and sold her interest, it would have been good if only a day had intervened. This is the same thing. Suppose the wife had made a stand after the power was executed, the Court would not have compelled her to levy a fine. It was in her power to do it or not. In the case put, of a father appointing to a child, making himself a partaker, the appointment would only be avoided as against other children, not against a remainder-man.

(a) Afterwards Lord Chancellor and Earl of Northington.

The Lord Keeper, Henley (a).—The question is whether Edmund Aleyn has properly executed the power as a jointure, and has properly conveyed to the defendant, Belchier, or whether the transaction is void in toto, or in part. I am inclined to think the power was not well executed in point of law (b). It ought to have been before marriage. The power is given under restrictions. It must be a jointure in bar of dower, which can only be before marriage. Dower is not barrable by a jointure after marriage. But, I build my opinion upon the next question.

(b) Sed vide 2 Sugd. Pow. 321.

The whole transaction is an agreement between the husband and wife. No point is better established than that *a person having a power must execute it bonâ fide for the end designed, otherwise it is corrupt and void.* The power here was intended for a jointure, not to pay the husband's debts. The motive that induced Edmund to execute it was not a provision for his wife. This case is not distinguishable from the cases alluded to, nor from *Lane* v. *Page*. If a father has a power to appoint amongst children, and agrees with one of them, for a sum of money, to appoint to him, such appointment would be void. It was admitted the execution would be void, but it was said to be only so amongst the children. In that case the money is to go to the children: no other person has any

interest in it; here the remainder-man has an immediate right to the estate after the death of Edmund, if there is no appointment. It was said to differ from the case of parent and children; and that, if the husband had fairly executed the power, the wife might have immediately afterwards joined in a fine to pay his debts. The reason is plain: she would then have had a first interest, and the husband would have had no control over it; but it does not from thence follow that they might make an agreement to divide the money between them. It cannot be supposed he would have settled the whole on her without some such view. She was of no family and had no fortune. It would have kept the children, if they had any, entirely out of the estate till her death. It is like the case put of parents and children; and I think *Lane* v. *Page* is in point, and ought to govern my decision in the present case.

Declare the appointment good as to the 100*l.* only, for the benefit of Jane. The plaintiff to redeem, on payment of principal and interest of the mortgage and costs, so far as relates to the mortgage. Account of rents and profits from the death of Edmund; and Belchier to pay the rest of the costs.

Aleyn v. *Belchier* was decided upon the well-established principle that a person having a power, *must execute it bonâ fide for the end designed*, otherwise the appointment, though unimpeachable at law, will be held corrupt and void in equity; for, although the Lord Keeper seemed inclined to think, that the power was not well executed, even at law, he founded his decision expressly upon the ground that the appointment was a fraud upon the donor of the power, and therefore void in equity. See *Topham* v. *The Duke of Portland*, 31 Beav. 525; 1 De G. Jo. & Sm. 517; *S. C.*, nom. *Duke of Portland* v. *Topham*, 11 H. L. Ca. 32. *Topham* v. *Duke of Portland*, 5 L. R. Ch. App. 40; *D'Abbadie* v. *Bizoin*, 5 I. R. Eq. 205. The recent case, however, of *In re Huish's Charity*, 10 L. R. Eq. 5, seems to have departed from the doctrines above laid down. The principle, somewhat concisely stated by the Lord Keeper in *Aleyn* v. *Belchier*, has been recently more fully and

forcibly enunciated in the House of Lords. "The donee, the appointor under the power," observes Lord *Westbury*, C., "must, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power), which he may desire to effect in the exercise of the power," 11 H. L. Ca. 54; and to the same effect Lord *St. Leonards* observes: "A party having a power like this (to appoint amongst children) must fairly and honestly execute it, without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit for himself, either directly or indirectly. It may be subject to limitations and directions; but it must be a pure, straightforward, honest dedication of the property, as property, to the person to whom he affects, or attempts to give it in that character." *Ib.* 55.

Upon the same grounds as the decision in the principal case, where a man has a power to make a jointure under restrictions, as 100*l.* a-year for every 1000*l.* of the wife's portion, and he has himself advanced a sum of money, in order colourably to enable him to make the jointure larger, the Court will reject such part as is more than proportionate to the real fortune: *Lane* v. *Page*, Amb. 234, per Lord *Hardwicke; Lord Tyrconnel* v. *Duke of Ancaster*, Amb. 237; *S. C.*, 2 Ves. 500; where the judgment is more fully reported; and see *Weir* v. *Chamley*, 1 Ir. Ch. Rep. 295, 317. In *Lane* v. *Page*, Amb. 233, a tenant for life, with power of jointuring, being greatly in debt, and actually arrested, executed his power of jointuring to its full extent, having previously entered into an agreement with the woman whom he afterwards married, that she was to join in levying a fine, the use of which was to pay her 20*l.* a-year only for her benefit; 50*l.* a-year was to be applied in payment of his debts, and then to his wife for life; and the residue of the profits during her life should, after his death, be paid as he should appoint, or, in default of appointment, should go to his executors, administrators, and assigns. The husband died soon after the marriage, no fine having been levied; but the widow, by indentures of lease and release, conveyed the premises, in trust to pay 20*l.* a-year to herself for life, the overplus of the rents in discharge of her husband's debts, and then in trust for herself for life. Upon a bill being filed by the remainder-man to set aside this execution of the power, Lord

Hardwicke held, that it was a fraud on the property of a third person, the remainder-man, but that it ought to be supported as to the 20*l.* a year. "Fraud," he observed, "will affect only so far as it extends; and this Court will not say that particeps criminis shall have no benefit of the agreement in any part." And, accordingly, it was declared that the agreement and conveyance ought to be considered as one transaction, and set aside, except as to the 20*l.* to the wife.

So an appointment to a child by a father in consideration of his wife postponing her jointure to some mortgages which he proposed to effect, was held by Sir *W. Page Wood*, V. C., to be void. "I think," said his Honor, "it would be impossible to contend if a direct bribe were given to the appointor, though out of a separate fund, that the appointment could be upheld in favour of the party to whom the fund subject to the appointment was given:" *Rowley* v. *Rowley*, Kay, 242.

Upon the same principle also, if a parent, having a power of appointment amongst his children, appoints to one or more of them, to the exclusion of the others, upon a bargain for his own advantage, equity will relieve against the appointment as a fraud upon the power, as where there was a secret understanding that the child should assign a part of the fund to a stranger (*Daubeny* v. *Cockburn*, 1 Mer. 626; *In re Marsden's Trusts*, 4 Drew. 594); where an appointment was made to one of the children in consideration of her having agreed, out of part of the sum appointed, to pay part to persons not objects of his power; *Hanley* v. *M'Dermott*, 9 I. R. E. 35; to pay her father's debts (*Farmer* v. *Martin*, 2 Sim. 502; and see *Thomson* v. *Simpson*, 2 D. & W. 459; 8 Ir. Eq. Rep. 55, 59; *Askham* v. *Barker*, 12 Beav. 499; *Conolly* v. *M'Dermott*, Beat. 601; Sugd. Prop. 513; *Jackson* v. *Jackson*, Dru. 91; 7 C. & F. 977; *Carver* v. *Richards*, 27 Beav. 488; 1 De G. F. & Jo. 548); or where the appointment is expressed to be made in payment of a debt: *Reid* v. *Reid*, 25 Beav. 469; and see *Beddoes* v. *Pugh*, 26 Beav. 407, 411. In *Arnold* v. *Hardwick*, 7 Sim. 343, Sir *L. Shadwell*, V. C., even held that an antecedent bargain between a father and two of his children, that if the appointment were made in their favour they would lend the fund to their father, would vitiate the appointment.

An appointment to a child, although not for the advantage of the appointor, will be invalid, if it be not made bonâ fide. Thus, in *Salmon* v. *Gibbs* (3 De G. & Sm. 343), the donee of a power of appointment among his children, to whom it was given in default of appointment, had only two daughters, and appointed nearly

the whole of the fund to one of them, who was unmarried, on an understanding, but without any positive agreement, that the appointee would re-settle one moiety of it on trust for the separate use of the other daughter, who was married, exclusively of her husband, and after her death on trust for her children. A re-settlement was accordingly made without the privity of the married daughter, who did not hear of the transaction until several years after. It was held by Sir *J. L. Knight Bruce*, V. C., on the suit of her husband, that the appointment was invalid, and a settlement was directed to be made of his wife's share.

Moreover, where an appointment is exercised with the view of defeating the object of the power, it will be invalid, although the objectionable arrangement has not been made known to the appointee, if the appointment was made by the appointor relying upon the moral influence which his wishes, when made known to the appointee, would exercise over him, in carrying out such arrangement. See in *Re Marsden's Trusts*, 4 Drew. 594. There a married woman having power to appoint a fund (of which she received the income for her life), among her children, appointed the whole fund at her death to her eldest daughter. It appeared in evidence that the married woman, considering that her husband was unjustly excluded from any interest under the settlement, intended to exercise her power by appointing the whole property to her eldest daughter, upon condition that upon attaining her majority she should give certain interests to her father; but when advised that such an appointment would on the face of it be invalid, she exercised her power by giving the whole of the property to her eldest daughter under an arrangement with her husband that on her death the daughter should be informed by her father of the intention with which the appointment was made, and so be induced to carry out the intention. Sir *R. T. Kindersley*, V. C., held the appointment bad, as a fraud on the power. "In some of the cases which have been cited," said his Honor, "there has been a direct bargain between the donee of the power and the person in whose favour it is exercised, under which the donee of the power was himself to derive a benefit; and certainly there has been nothing of that kind in this case. In my opinion, however, it is not necessary that the appointee should be privy to the transaction, because the design to defeat the purpose for which the power was created will stand just the same, whether the appointee was aware of it or not; and the case of *Wellesley* v. *Mornington* (2 K. & J. 143) shows that it is not necessary, in order

to bring the case within the scope of the jurisdiction on which this Court acts, that the appointee should be aware of the intentions of the appointment, or of its being actually made. Neither is it necessary that the object should be the personal benefit of the donee of the power. If the design of the donee in exercising the power is to confer a benefit, not upon himself actually, but upon some other person not being an object of the power, that motive just as much interferes with and defeats the purpose for which the trust was created, as if it had been for the personal benefit of the donee himself." See also *Ranking* v. *Barnes*, 12 W. R. (V.-C. K.) 565 ; *Topham* v. *The Duke of Portland*, 31 Beav. 525 ; 1 De G. Jo. & Sm. 517 ; 11 Ho. Lo. 32, nom. *The Duke of Portland* v. *Topham ; Topham* v. *Duke of Portland*, 5 L. R. Ch. App. 40. But see *Proby* v. *Landor*, 28 Beav. 504.

Although questions of this nature generally arise upon a fraudulent arrangement between husband and wife, or between parent and child, the interference of equity is by no means confined to cases in which the donee and object of the power stand in that relation towards each other ; for an arrangement between any person having a power, even although he may have been by a voluntary deed the original donor of the power, and any of the objects of it, in fraud of the original intention with which the power was created, will render an appointment void in equity. Thus, in *Lee* v. *Fernie*, 1 Beav. 483, A. B., being desirous of settling property on the female descendants then in existence of C. D., by a voluntary deed reciting this desire, and that certain persons therein named were the only descendants then living of C. D., settled a part of the property on the persons so named, and reserved to himself a power of appointing the remaining part of the property amongst such several persons before named, which, in default of appointment, was given to those several persons. A. B. afterwards discovered that there were other descendants in existence, of C. D., who had been omitted, and to remedy the omission, he appointed a part of the fund to an object of the power, upon his executing bonds for the payment to the persons newly discovered of the amount when received. Lord *Langdale*, M. R., held that the appointment was void. "It certainly seems," said his Lordship, "a hard thing that he, the author of this gift, and the owner of this property, could not do this ; but he had declared a trust —he had said that it should belong to certain persons—that the power he had reserved should be exercised for the benefit of certain persons only ; and I quite agree with those who advised him,

that it was not competent for him, of his own authority, to alter that destination of his property." And see *Topham* v. *The Duke of Portland*, 1 De G. Jo. & Sm. 517.

As in all other cases imputing fraud, the burden of proof lies on the person who seeks to set aside an appointment as fraudulent. Thus in *Campbell* v. *Home*, 1 Y. & C. C. C. 664, where a lady who had a life interest in a fund, with power to appoint to one or more of her children, exclusively of the others, appointed the whole to one child, who had attained the age of twenty-one, and assigned her life interest to such child, one of the trustees refused to join in the transfer to the daughter. Sir *J. L. Knight Bruce*, V. C., upon a bill being filed against the trustee by the daughter, held that he was bound to join in the transfer. "What may be the intention," said his Honor, "of this lady in regard to the disposition of her money, is not a question with which the Court has to deal. If it can even be shown that this deed was executed from improper motives, those who are interested in doing so can apply to set it aside." So in *Askham* v. *Barker*, 17 Beav. 37, a tenant for life had the power of appointing the settled property amongst such of his children as he should think fit. The trustees had in breach of trust lent him part of the trust monies, without taking any security. Afterwards the tenant for life appointed to his daughters the money so lent, and 500*l.* in exclusion of his son. Contemporaneously the daughters exchanged the sum so appointed for an estate of the father, and then the old trustee retired. Sir *John Romilly*, M. R., held that there was no fraud on the power, as the estate was worth the amount given in exchange. See also *M'Queen* v. *Farquhar*, 11 Ves. 467; *Green* v. *Pulsford*, 2 Beav. 70; *Mills* v. *Spear*, 3 Ir. Ch. Rep. 304; *Pickles* v. *Pickles*, 9 W. R. (V.-C. K.) 396; *Ib.* (L. J.) 763; *Pares* v. *Pares*, 33 L. J. (N. S.) Ch. 215.

But where the fair inference from the facts is, that the appointor *before* the execution of an appointment intended to derive to himself a benefit therefrom, the burden rests on those who support the transaction to show that the intention had been abandoned at the time of the execution of the deed: *Humphrey* v. *Olver*, 7 W. R. (L. J.) 334; 28 L. J. (N. S.) Ch. 406.

Where the donee of a power intends to appoint, and the appointee intends to settle the property, the appointment will be valid, although the appointee by a deed executed soon after, or even by the same deed, settles the property upon persons who are not objects of the power. This often takes place when a parent, on the marriage of a child, makes an appointment in favour of the child, who is the object of the

power, and the child, either by the same or a subsequent deed, settles the property upon (amongst others) her intended husband and the children of the marriage, who are not objects of the power. See *Routledge* v. *Dorril*, 2 Ves. jun. 357; *Langston* v. *Blackmore*, Amb. 289; *West* v. *Berney*, 1 Russ. & My. 431; *White* v. *St. Barbe*, 1 V. & B. 399; *Wade* v. *Paget*, 1 Bro. C. C. 363; *Irwin* v. *Irwin*, 10 Ir. Ch. Rep. 29; *Sed vide Trollope* v. *Routledge*, 1 De G. & Sm. 662; *Salmon* v. *Gibbs*, 3 De G. & Sm. 343; *In re Gosset's Settlement*, 19 Beav. 529, 537; *Fitzroy* v. *The Duke of Richmond*, 27 Beav. 190; *Cuninghame* v. *Anstruther*, 2 L. R. Sco. App. 223, 234; *Roach* v. *Trood*, 3 Ch. D. 429.

And where, after an appointment made by a father to his daughter previous to marriage, the intended husband in the marriage settlement gave up to the father an interest in the sum appointed, to which otherwise he (the husband) would be entitled, by his marital right, the appointment has been held not to be thereby invalidated; at any rate, where the father was not, on making it, influenced by what the husband gave up to him. See *Cooper* v. *Cooper*, 5 L. R. Ch. App. 203. There by a settlement made on the marriage of Mr. Thomas Daniell and Mrs. Daniell, funds were settled after the death of the survivor of them in trust for all and every of the children of the marriage, as they should jointly or as the survivor should appoint; and in default of appointment, in trust for all the children in equal shares. Upon the marriage, in 1834, of Sophia, one of their daughters, then under age, to Captain England, Mr. and Mrs. Daniell appointed a portion of the funds in her favour, and Mr. Daniell executed a bond for payment of an equal sum to her trustees in or before 1842, with interest in the meantime. Subsequently a settlement was executed, the trusts of which were to pay the income of the trust funds to Mr. and Mrs. England successively for life; after the death of the survivor, the principal to go among the children of the marriage; and the ultimate limitation in default of children of the marriage was "for *Mr. Thomas Daniell, his executors, administrators, and assigns.*" There were children of this marriage, to some of whom, on their marriage, appointments had been made by Mr. and Mrs. England. Upon a bill being filed by the second husband of one of Mr. and Mrs. Daniell's daughters, praying, amongst other things, that the appointment to Mrs. England might be declared a fraud upon the power, and that the fund might be divided as in default of appointment, it was held by Lord *Hatherley*, L. C., affirming the decision of Sir *W. M. James*, V. C.,

(reported 8 L. R. Eq. 312), that the appointment to Mrs. England, who was an infant at the time of her marriage, was not corrupt or improper, so as to render the appointment invalid, inasmuch as the bargain under which Mr. Thomas Daniell reserved to himself an ultimate interest in the appointed fund, was a bargain between himself and Mr. England, the intended husband. "It is said," observed his Lordship, "that this case falls within that class of authorities which have decided that a donee of a power cannot stipulate for any benefit for himself with reference to the exercise of the power; and that if he does so the whole appointment is vitiated by the consideration that he has not made it with the simple intention of providing for the children, and that you cannot separate such part of the transaction as has been done under the influence of the corrupt bargain from the other part, but the whole appointment must be held to be void in favour of all those who take in default of appointment. I should be extremely sorry to say a word that would tend to break in on a rule so well and so justly established. Undoubtedly there would be considerable difficulty in dealing with a deed of this description if any such bargain were proved, notwithstanding the father's making a provision which is said to be equal to or greater in value than the ultimate reversion which he takes, because it is obvious that in the event of the husband and wife dying early without issue, the father might take an interest far greater than anything he has provided. It seems to me, therefore, an exceedingly doubtful transaction in any way to support. But in the case of Mrs. England's settlement, the bargain was not to take anything out of the daughter's share; but the husband says to the father, 'I will settle the fund in this way; but in the event of my wife dying, and there being no issue, and any right accruing to me, except under the settlement, I waive altogether my marital right, and the fund shall go back to you or the family of my wife.' I have not found any case which goes *to the extent of overthrowing a bargain which was not a bargain with the daughter, not a bargain to induce the father to make the appointment.* In the present case the deeds are all put before me, and nothing else, without a word of evidence or explanation, and I am entitled to construe them in a reasonable way, taking into consideration the whole transaction. I find no authority for saying that this is such a bargain as can be supposed to have influenced the father's mind in making the appointment, and without which it would not have been made. I put the question as Lord Justice *Knight Bruce* put it in the course of the argument in *Topham* v.

The Duke of Portland (1 De G. J. & Sm. 555), 'Would the appointment have been made but for the condition?' The answer is 'Yes.' The appointment is made of a reasonable and proper share, and it is settled reasonably and properly, and the whole result of the settlement takes nothing from the daughter. All that comes to the father is such a claim as he may have against the husband, so that it shall not go to the husband's family."

Where, however, the reason of an appointment being made to the appointee arises from a previous contract by him with the donee of the power to settle the property upon persons who are not objects of the power, then the appointment is invalid, as being a fraud upon the power: *Birley* v. *Birley*, 25 Beav. 299; *Pryor* v. *Pryor*, 32 L. J. (N. S.) Ch. 731; 33 L. J. (N. S.) Ch. 441; 2 De G. J. & S. 33.

The question in all these cases is this, In what character did the appointee take the property? If he took absolutely, he might do with it as he pleased; but if trust for the donee of the power, and to effect that which it was not within the authority of the donee to effect under the terms of the power, then it is illegal, and amounts to nothing: per Sir *J. Romilly*, M. R., in *Birley* v. *Birley*, 25 Beav. 308.

As to the costs of trustees declining to make a transfer to a father and child who has just attained his majority, and to whom his father has made an appointment in exclusion of other objects, see *King* v. *King*, 3 Jur. (N. S.) 608; 5 W. R. (V.-C. S.) 699; 1 De G. & Jo. 663.

A question sometimes arises, whether a fraudulent arrangement as to part of the property appointed vitiates the appointment in toto, or such part merely to which the fraud extends.

Where a fraudulent appointment has been made in pursuance of a power of jointuring, the wife, in whose favour the power is exercised, being the sole object of the power, it appears to be now settled that the appointment may be severed, and held good to the extent to which the jointress is entitled, but bad with reference to the corrupt and improper use that may be made of the surplus. *Lane* v. *Page*, Amb. 233; *Aleyn* v. *Belchier*, 1 Eden. 138; and *ante*, p. 422; and the remarks of Sir *W. Page Wood*, V. C., in *Rowley* v. *Rowley*, Kay, 259.

Where, however, the power is to appoint to several objects, an appointment to one of them, fraudulent in part, will ordinarily be set aside in toto. See *Daubeny* v. *Cockburn*, 1 Mer. 626, where this question was fully considered. In that case there was a voluntary settlement of personal property, in trust for such one or more of his children as the settlor should appoint. He appointed to one

child exclusively, upon a secret understanding that she should assign a part of the fund to or in favour of a stranger. It was contended, upon the authority of *Lane* v. *Page*, and the principal case, that the appointment was only void as to the part of the fund agreed by the daughter to be assigned. However, Sir *W. Grant*, M. R., held the appointment void in toto. "Upon principle," said his Honor, "I do not see how any part of a fraudulent agreement can be supported, *except where some consideration has been given that cannot be restored; and it has, consequently, become impossible* to *rescind the transaction in toto, and to replace the parties in the same situation.*

"In the case of *Lane* v. *Page*, the subsequent marriage formed such a consideration on the part of the wife. In the case of *Aleyn* v. *Belchier*, where the appointment was subsequent to the marriage, it can hardly be said to have been decided that the appointment was good in any part. For it appears, by the registrar's book, that the bill contained a submission to pay the annuity to the wife, and only sought relief against the other objects of the appointment."

"In ordinary cases of fraud the whole transaction is undone, and the parties are restored to their original situation. If a partially valuable consideration has been given, its return is secured as the condition on which equity relieves against the fraud. But, in such a case as the present, the appointment of any particular proportion to any particular child, is a purely voluntary act on the part of the parent; and, although as good, if fairly made, as if the consideration were valuable, yet what is there that a Court can treat as a consideration, which must be restored if a fraudulent appointment be set aside, or as incapable of restitution, and, therefore, support the appointment, so far as it is for the child's benefit? To say it is to be supported to that extent, would be to say that the child shall have the full benefit of the fraudulent agreement. . . . Either, then, you must hold that a child giving a consideration for an appointment in its favour, is guilty of no fraud on the power, or you must wholly set aside the appointment procured by the fraud. Now, although the father in proposing such a bargain is much more to blame than the child in acceding to it, still it is impossible to say that an appointment obtained by means of such an agreement, is fairly obtained. It is a fraud upon the other objects of the power, who might not, and in all probability would not have been excluded but for this agreement. It is more particularly a fraud upon those who are entitled in default of appointment; for non constat that the father would have appointed at all, if the child had not agreed to the proposed terms."

See *Beddoes* v. *Pugh*, 26 Beav. 407, 412.

The distinction taken by Sir *W. Grant* seems to be sound in principle; and appointments to children, in part fraudulent, have ever since, notwithstanding the dicta attributed to Lord *Hardwicke*, in *Lane* v. *Page*, Amb. 235, been set aside in toto. See *Farmer* v. *Martin*, 2 Sim. 502; *Arnold* v. *Hardwicke*, 7 Sim. 343; and see *Lee* v. *Fernie*, 1 Beav. 483.

The general rule, however, laid down in *Daubeny* v. *Cockburn* (1 Mer. 626), that where an appointment is made for a bad purpose the bad purpose affects the whole appointment, does not, it seems, apply to cases in which the evidence enables the Court to distinguish what is attributable to an authorised from what is attributable to an unauthorised purpose: *Topham* v. *The Duke of Portland*, 1 De G. Jo. & Sm. 517; *Carver* v. *Richards*, 1 De G. F. & Jo. 548; *Rankin* v. *Barnes*, 12 W. R. (V.-C. K.) 565; and see *Sadler* v. *Pratt*, 5 Sim. 632.

So, where there is a sum of money to be appointed among children, although an appointment to one child may be void on account of a corrupt agreement, an appointment to another child, although by a contemporaneous deed, if it can be severed from the previous appointment, so as not to form part of the same transaction, will be valid: *Rowley* v. *Rowley*, Kay, 242; and see *Harrison* v. *Randall*, 9 Hare, 397.

A fraudulent execution of a power will be set aside as against a purchaser for valuable consideration, *with notice* of the fraud: *Palmer* v. *Wheeler*, 2 Ball. & B. 18; or even if he had *not notice* of the fraud, if he has not got the legal estate, for then there are only equities to deal with; and, as observed by Sir *W. Grant*, M. R., "The payment of a money consideration cannot make a stranger become the object of a power created in favour of children; he can only claim under a valid appointment executed in favour of some or one of the children:" *Daubeny* v. *Cockburn*, 1 Mer. 626, 638.

But a purchaser must, it seems, have actual notice of a fraud upon a power, in order to be affected by it; circumstances which may give rise to mere grounds of suspicion or probability of fraud are not sufficient. Thus, in *M'Queen* v. *Farquhar*, 11 Ves. 467, where A. was tenant for life, remainder to his wife for life, with power to appoint to one or more of his children by her, [illegible] entered into a contract [illegible] for the sale of the estate to him, and afterwards appointed (subject to the life-interest of himself and his wife) the fee simple of their estate to R., the eldest son, who had attained the age of twenty-one; and then A. and his wife, and R. their son, conveyed the estate to T. in

consideration of a sum of money, expressed to be paid to all of them. This appearing upon an abstract, an objection was taken to the title, that the appointment by A. in favour of his son R. appeared to have been made under a previous agreement between them; and that if A. derived any benefit from that agreement, which seemed probable, or even made any previous stipulation that his son should join him in a sale, which there appeared the strongest reason to apprehend, it would have been a fraudulent execution of the power. Lord *Eldon*, however, overruled the objection. "It does not appear," said his Lordship, "that the estate sold for less than its value—that the son got less than the value of his reversionary interest. But the estate becoming his absolutely by the appointment, he by an instrument, affected by nothing but the contents of it, as the owner of the reversion, accedes to the purchase, conveys with his father and mother, in consideration of 8000*l*., and the parties taking the conveyance pay the money to the father, the mother, and the son, to be dealt with according to their respective interests; that is, according to their rights in the land: and, though the contract with T. was only to substitute money for the estate, there was nothing to show that the son was not to receive a due proportion of the money, when the contract was afterwards executed by the deed, in which he joins, and, with his father and mother, receives all the money. Upon the question, therefore, whether those possibilities and probabilities are sufficiently evidenced by anything to show that this is not a good title, my opinion is, that it is a good title:" see also *Cockcroft* v. *Sutcliffe*, 2 Jur. N. S. 333, 25 L. J. Ch. 313; *Laurie* v. *Bankes*, 4 K. & J. 142.

And it seems that the Court would be less disposed to impeach an appointment as fraudulent, after a great lapse of time, and where there have been subsequent dealings with the funds, such, for instance, as subsequent appointments thereof on the marriage of daughters or the establishment of sons in the world: *Cooper* v. *Cooper*, 5 L. R. Ch. App. 203, 212, 213; *S. C.*, 8 L. R. Eq. 312.

Where there is an arrangement for settling the interests of *all* the branches of a family, children may contract *with each other* to give a parent, who had a power to distribute property among them, some advantage, which the parent, without their contract with each other, could not have. Thus, in *Davis* v. *Uphill*, 1 Swanst. 130, an estate being limited, under her marriage settlement, to A. *for life*, with remainder to her children by her deceased husband, in such manner as she should appoint, remainder, in default of appointment, to all the children as tenants in common;

an agreement by the children, that on her joining in suffering a recovery, the first use to which the recovery should enure, should be to A. for life, *without impeachment of waste*, is it seems valid in equity; and the Court, therefore, refused to continue an injunction to restrain her from cutting timber. See also *Rhodes* v. *Cook*, 2 S. & S. 488; *Skelton* v. *Flanagan*, 1 Ir. Eq. Rep. 362.

But if any such transaction taken as a whole appears not to be a bonâ fide family arrangement, but that it has been entered into in fraud of the power, for the purpose of giving a benefit to a person who was by the donor excluded from being an appointee, or from deriving any advantage from the exercise of the power, it will be held wholly void: *Agassiz* v. *Squire*, 18 Beav. 431.

Where there is no fraud, equity will not advert to the circumstances of anger and resentment, under which it may be alleged that an appointment has been made. See *Vane* v. *Lord Dungannon*, 2 S. & L. 130, where Lord *Redesdale* said, he did not think it safe to advert to such objections, as there would be no end of them, if they were admitted as grounds for questioning appointments, since in almost all these cases, where there has been an inequality in the appointment, something of that kind has existed. See, also, *Supple* v. *Lowson*, Amb. 729.

If under a power of appointment and selection among children, an appointment be made upon a condition to be performed by the appointee, not authorised by the power, the appointment will be good, but the condition void: *Stroud* v. *Norman*, Kay, 313; *Re Lord Sondes' Will*, 2 Sm. & Giff. 416; *Watt* v. *Creke*, 3 Jur. N. S. 56, 3 Sm. & Giff. 362, and see *Stuart* v. *Lord Castlestuart*, 8 Ir. Ch. Rep. 408; *Roach* v. *Trood*, 3 Ch. D. 429.

The principle laid down in *Aleyn* v. *Belchier*, viz. *that a power must be executed bonâ fide, and for the end designed*, is applicable also to another class of cases where parents, having power to raise portions for children, and even to fix the time when they are to be raised, will not be allowed by a Court of equity, as personal representatives of a deceased child, to derive any advantage from an appointment made to the child during infancy, and while not in want of a portion, especially if the death of the child, at the time of the appointment, was expected. Thus in *Hinchinbroke* v. *Seymour*, 1 Bro. C. C. 394, a father under a power, in a settlement to raise portions to be paid at *such time* as he should appoint, directed the trustees to raise 10,000*l.* *immediately* for his daughter, then fourteen years of age, who soon afterwards died; he, as her administrator, filed a bill against the trustees to have the 10,000*l.* raised for his own use, but Lord *Thurlow* dismissed the

bill, observing, "The meaning of a charge for children is that it shall take place when it shall be wanted; it is contrary to the nature of such a charge to have it raised before that time. And although the power is, in this case, to raise it when the parent shall think proper, yet that is only to enable him to raise it in his own life, if it should be necessary. It would have been very proper so to do upon the daughter's marriage, or for several other purposes; but this is against the nature of the power."

"*The case of Lord Sandwich*," observes Lord Chancellor *Sugden*, "where a father, who had a power of appointment among his children, thinking one of them was in a consumption, appointed to that child, in order that he might take as the child's administrator, decides that if a father, having such a power, charges a portion for a child, not because the child wants it, but because it is sickly and likely to die, the Court has power to defeat it:" *Keily* v. *Keily*, 5 Ir. Eq. Rep. 442; 4 D. & W. 55; *S. C.*, cited 11 Ves. 479. See, also, *Lord Pawlet's case*, 2 Vent. 366; *Edgeworth* v. *Edgeworth*, Beat. 328; *Gee* v. *Gurney*, 2 Coll. 486; *Wellesley* v. *Earl of Mornington*, 2 K. & J. 143.

An appointment however to an infant child before he wants it, of a sum already set apart, will not be invalid, merely because the appointor may, in the event of the child's death, derive some benefit from it to the disappointment of those entitled in default of appointment: (*Butcher* v. *Jackson*, 14 Sim. 444; *Hamilton* v. *Kirwan*, 2 J. & L. 393; *Beere* v. *Hoffmister*, 23 Beav. 101;) à fortiori will the appointment be good if the parent himself can derive no benefit from it, although upon the death of the child the mother takes as his representative to the exclusion of the persons who would have been entitled in default of appointment. Thus in *Fearon* v. *Desbrisay* (14 Beav. 641), a father had a power of appointing a fund amongst his children, their shares to vest at such ages as he should appoint, and if he made no appointment, it was to vest in them equally at twenty-one or marriage, and there was a gift over, if there should be no child entitled under the trusts or power: on the birth of a son, the father executed the power by giving the whole to such son, but afterwards upon an expected addition to his family, he, being in a weak state of health, revoked the former appointment and executed the power in favour of *all* his children *who should be living at his death*, equally. The father then died. It was held by Sir *John Romilly*, M. R., that the appointment was good, as not being a fraud on the power, and that upon the death of one of the children the mother was entitled to her share as administratrix.

"To say," observed his Honor, "that because the settlement specifies the manner in which the fund is to go if unappointed, the power must necessarily be partially cut down, so as to prevent the donee from disappointing those to whom the property is to go in default of appointment, does not appear to me a fair conclusion. . . . In the present case it is manifest that the appointor could *gain no personal advantage for himself*, by the mode in which he has executed the power; for the persons in whose favour the appointment is to take effect could not be ascertained until his own death. All the cases therefore in which the donee obtained an advantage by the execution of the power may be excluded from my consideration. I cannot speculate on what other objects he might have had, if I find that he had the absolute power of appointment amongst his children, and that he exercised it in such a manner that he could not obtain any personal advantage from it."

Although it would doubtless be a fraud upon the trusts if trustees having power of advancing moneys to an infant under powers of maintenance and advancement, laid out money, for instance, in the purchase of a commission in the army, with the intention that the infant should by sale of the commission obtain the money for other purposes, that will not be the case where the advance has been bonâ fide made, although the infant is soon afterwards obliged to sell his commission in consequence of his debts, and he or his assignees for value, if without notice of any impropriety in the sale, will be entitled to the proceeds thereof: *Lawrie* v. *Bankes*, 4 K. & J. 142.

A tenant for life may clearly release a power to appoint amongst children (*West* v. *Berney*, 1 Russ. & My. 434; *Horner* v. *Swann*, T. & R. 430; *Smith* v. *Death*, 2 Madd. 371; *Bickley* v. *Guest*, 1 Russ. & My. 446; 1 Bligh, 15; *Davies* v. *Huguenin*, 1 Hem. & Miller, 730), or may covenant with a mortgagee of his life interest not to exercise a power of charging the estate with portions for younger children (*Hurst* v. *Hurst*, 16 Beav. 372, and see *Miles* v. *Knight*, 17 L. J. (N. S.) Ch. 458; 12 Jur. 666), or with creditors to make a certain appointment by will in favour of a child an object of the power: *Coffin* v. *Cooper*, 13 W. R. (V.-C. K.) 571.

But no effect will be given to a release of a power by a father, so as to vest property in himself, which was intended for his children; or in other words, a power given for a particular purpose will not be allowed by a fraudulent circuity to be exercised for a different purpose. Thus, in *Cuninghame* v. *Thurlow*, 1 Russ. & My. 436, where a fund was limited to a father for life, with remainder to his children, in such shares as

he should appoint, and in default of appointment to the children equally, the father released the power as to a portion of the fund, so as to vest a share of it in himself as executor of a deceased son, who, in default of appointment, took a vested interest. Sir *L. Shadwell*, V. C., although he was of opinion that the power was extinguished by the release, nevertheless decided that the Court ought not to give effect to the release, so far as it operated to vest a share of the fund in the father, who was the donee of the power. In the case, however, of *Smith* v. *Houblon*, 26 Beav. 482, a father had an exclusive power of appointment in favour of his children over a fund, which in default of appointment was limited to them equally, and as representative of a deceased son he was, in default of appointment, beneficially entitled to one-third of the fund. The father released the power to his mortgagees. A bill was filed by the mortgagees, praying, amongst other things, for a declaration that the deceased son's share, on the release of the power, became vested in the mortgagees. Counsel for the mortgagees distinguished the case from *Cuninghame* v. *Thurlow*, inasmuch as there the donee of the power, by the deed releasing it, obtained for himself a personal benefit, to which he would not otherwise have been entitled; whereas in the case under consideration, the release was to the mortgagees, as against whom the mortgagor could not execute the power in derogation of his own grant. It was held by Sir *John Romilly*, M. R., that the power had been effectually released, and he declared the rights of the parties consequent thereon.

If the consent of another person to the exercise of a power is requisite, and that consent is obtained by misrepresentation, the appointment will be set aside. Thus, in *Scroggs* v. *Scroggs*, Amb. Blunt's ed. 272, and App. 812, a case which falls entirely within the principle of *Aleyn* v. *Belchier*, a father was tenant for life, with remainder to the use of such of his son and sons as he, with *the consent* of the trustees, or the survivor of them, should appoint, and, in default of appointment, to his first son in tail male. The father, by misrepresenting his eldest son to the surviving trustee as extravagant and undutiful, *prevailed upon him to consent* to an appointment to a younger son. Upon a bill being filed by the eldest son, it was proved that the son was dutiful and not extravagant, and that the father, from improper motives, had misrepresented him to the trustee. The appointment was set aside by Lord *Hardwicke*, who observed, that if the trustee and father had met fairly, and without imposition, and considered the family circum-

stances, and had executed the power for such reasons as biased their judgment, the Court would not interfere; but that, upon the whole, he was of opinion that it was a power accompanied with a trust, and that it was executed by an imposition on the trustee, who was designed to be a check on the father.

It seems that where in a marriage settlement there is a power of revocation and new appointment, with the consent of the trustees, it will be presumed that it was the intention of the parties that such consent was only to be given for the benefit of the objects of the settlement, and that if it be given merely for the purpose of putting money into the hands of the father, the revocation and new appointment will be considered as a fraud upon the power, and consequently void. See *Eland* v. *Baker*, 29 Beav. 137; there, by a marriage settlement, land was settled by the father of the lady to the wife for life, remainder to the husband for life, remainder to the children of the marriage. And there was a power to the father of the lady and the husband and wife, with the consent of the trustees in writing, by deed absolutely to revoke and make void all or any of the uses or trusts, and also by the same or any other deed to limit and declare new uses and trusts in substitution for those revoked. The father of the lady, and the husband and wife, with the consent of the trustees, revoked the settlement so far as was necessary, and appointed the property to one of the trustees in fee to secure a sum of money advanced to the husband. The estate was afterwards sold under a power contained in the mortgage deed. It was held by Sir *John Romilly*, M. R., that a good title could not be made under it. "I do not," said his Honor, "dispute the proposition, that a person may in a marriage settlement introduce a proviso which shall simply put an end to the deed. . . . But I consider this power of revocation to be for the purpose of re-limiting the estate, and re-limiting the estate to any new trusts and declarations. How must the estate be re-limited? To what trusts and with what declarations? The answer is, to trusts for the benefit of the persons who are the cestuis que trustent of the instrument according to the true scope and intent of the deed itself. . . . . How could it be said that this is a fair exercise of the discretion of the trustees in favour of their cestuis que trustent, if they exercise it in such a manner so as totally to defeat the whole beneficial interest of those persons whom, as trustees, they are bound to protect?" And after observing in addition to this upon the objection that the mortgage was to one of the trustees who became thereby pro tanto a purchaser of the estate, his Honor said it was

impossible to force the title upon a purchaser.

Where a person makes an appointment which is afterwards set aside as being in fraud of a power, the question is undetermined whether in the event of his not having reserved a right of revocation and new appointment he can again exercise his power: *The Duke of Portland* v. *Topham*, 11 Ho. Lo. Ca. 32.

It is, however, clear that where an appointment has been set aside by reason of what has taken place between the donee of a power and an appointee, a second appointment by the same donee to the same appointee cannot be sustained, otherwise than by clear proof on the part of the appointee that the second appointment is perfectly free from the original taint which attached to the first: *Topham* v. *The Duke of Portland*, 5 L. R. Ch. App. 40.

And the same rule it seems is applicable to all cases, whether the fraudulent appointment has been set aside by the Court, or revoked by the appointor: *Hutchins* v. *Hutchins*, 10 I. R. E. 453, 457.

It has been intimated in a recent case, where a person was donee of a power to be exercised only by will, in favour of children, that a covenant on the marriage of a child to exercise the power by appointing a certain share in favour of such child, may be illegal and void—upon the ground that the power is fiduciary, to be exercised by will only; so that up to the last moment of his life, the donee was to have the power of dealing with the fund as he should think it his duty to deal with it, having regard to the then wants, position, merits, and necessities of his children: per Sir *W. M. James*, V. C., in *Thacker* v. *Key*, 8 L. R. Eq. 414, 415; where, however, it was not necessary to decide the point. In the subsequent case of *Bulteel* v. *Plummer*, 6 L. R. Ch. App. 169, Lord *Hatherley*, C., said, that to hold an appointment made pursuant to such a covenant "bad as a device, would be to strain the doctrine as to improper appointments too far." See also, *Coffin* v. *Cooper*, 2 Drew. & Sm. 365.

There is another class of cases to be noticed, in which Courts of equity have interposed, upon the same principle, but not with the same beneficial results as in *Aleyn* v. *Belchier*; viz. where a person having a non-exclusive power of appointing property amongst a class, although with full discretion as to the amount of their shares, has exercised it by appointing to one or more of the objects a merely nominal share; such an appointment, although valid at law, will, if executed previous to the passing of 1 Will. 4, c. 46, be set aside as *illusory*, not being exercised bonâ fide for the end designed by the donor. To illustrate the doctrine of illusory

appointments, suppose A. had a power to distribute 100,000*l.* amongst a class in such shares and proportions as he should appoint, and he gave one of the class five shillings only, that would be at law a good execution of the power: *Morgan* v. *Surman*, 1 Taunt. 289. But such an appointment, or an appointment of ten guineas, or of any sum merely nominal, taking into consideration the amount to be distributed, and the number of persons amongst whom it is distributable, will, if executed previous to the passing of 1 Will. 4, c. 46, be held void in equity as illusory. It would, indeed, be perfectly competent to the donee of a power to make a very unequal distribution of the fund, provided that the inequality was not so great as to lay the appointment open to the objection of its being merely nominal and illusory, and, consequently, a fraud upon the donor of the power, who, it would be presumed, intended that each of the objects of the power should take a substantial share. Amongst the earlier cases on this subject, see *Gibson* v. *Kinven*, 1 Vern. 66; *Wall* v. *Thurborne*, 1 Vern. 355, 414, and *Cragrave* v. *Perrost* there cited; *Astry* v. *Astry*, Prec. Ch. 256; *Maddison* v. *Andrew*, 1 Ves. 57; *Coleman* v. *Seymour*, 1 Ves. 211; *Vanderzee* v. *Aclom*, 4 Ves. 771; *Spencer* v. *Spencer*, 5 Ves. 362. The doctrine applies to appointments of real as well as of personal estate: *Pocklington* v. *Bayne*, 1 Bro. C. C. 450.

Much litigation arose in consequence of the great difficulty of deciding what was a substantial, and not merely an illusory share; and great dissatisfaction with the doctrine was expressed by the most eminent judges, who endeavoured, in many cases, to narrow it. In *Wilson* v. *Piggott*, 2 Ves. jun. 351, where there was a sum of 4000*l.* to be appointed amongst four persons, Lord *Alvanley* said, that an appointment of 250*l.* to one of them would have been good. In *Kemp* v. *Kemp*, 5 Ves. 849, a person having a power of appointing nearly 1900*l.* among three children, appointed 10*l.* to one child, 50*l.* to another, and the remainder to the third. Lord *Alvanley*, M. R., in his judgment, observed, "I should hardly have conceived that 50*l.* could be considered a substantial part; but the sum of 10*l.* to the daughter was evidently meant to be no gift, the mother merely supposing herself to be under the necessity of giving something to each. . . . I am bound to say the bequest of 10*l.* was clearly meant as an illusion, and not as an execution; therefore the execution is void. It is vain now to lament, as I have in many other cases, that this Court did not follow the rule of law; but now this is so settled, that no judge will, and certainly I will not, presume to go against it. The Court must decide whether the share is substantial or not."

In the celebrated case of *Butcher* v. *Butcher*, 9 Ves. 382, the objects of the power were nine in number, and the fund to be appointed amongst them about 17,000*l.* To some of the objects of the power shares of 200*l.* Three per Cents. only were given. Sir *W. Grant*, M. R., held the appointment not to be illusory, but, like Lord *Alvanley*, strongly disapproved of this doctrine of equity. "To say," observed his Honor, "that under such a power an illusory share must not be given, or that a substantial share must be given, is rather to raise a question than to establish a rule. What is an illusory share, and what is a substantial share? Is it to be judged of upon a mere statement of the sum given, without reference to the amount of the fortune which is the subject of the power? If so, what is the sum that must be given, to exclude the inference of the Court? What is the limit of the amount at which it ceases to be illusory, and begins to be substantial? If it is to be considered with reference to the amount of the fortune, what is the proportion, either of the whole or of the share that would belong to each upon an equal division? In terms, the power, though limited as to objects, is discretionary as to shares. A Court of law says, no object can be excluded, but there it stops; it does not attempt to correct any, the extremest, inequality in the distribution. . . . As no case has been found, in which a sum of this amount has been declared illusory, there is no ground upon which I think myself justified in determining that this is an invalid appointment." So in *Bax* v. *Whitbread*, 16 Ves. 15, where the fund to be appointed between two children, objects of the power, was 2500*l.* Old South Sea Annuities, and 100*l.* stock was given to one child and 2400*l.* to the other, Sir *W. Grant*, M. R., referring to his decision in *Butcher* v. *Butcher*, held that the appointment was not illusory. So, also, in *Mocatta* v. *Lousada*, 12 Ves. 123, the fund was 2500*l.*; the objects of the power were five in number; to some he gave only a share of 33*l.* 6*s.* 8*d.* Sir *W. Grant*, M. R., held the appointment not illusory. "I adhere," said his Honor, "to the rule I laid down in *Butcher* v. *Butcher*, that I will go as far as I am bound by authority, but no farther. Show me a case in which a specific sum, or an equal proportion of what would be the share of each object of the appointment upon an equal division, has been held to be illusory, and I will in the same case make the same decision. But, where I am deprived of the guidance, or freed from the compulsion, of authority, I will not hold any appointment to be invalid upon that ground of objection. The case of *Kemp* v. *Kemp* is not an authority for this case; for the discussion of that turned not upon the 50*l.*,

but upon the 10*l.* All that is decided in that case is, that the appointment of 10*l.* was, under the circumstances, illusory, therefore I must hold this appointment to be good, adhering to the rule I laid down in *Butcher* v. *Butcher;* for this sum of 33*l.* 6*s.* 8*d.* is not the same specific sum, or the same proportion of the share of each child, upon an equal division, that has been, in any former instance, held to be illusory." See, also, *Duke* v. *Sylvester,* 12 Ves. 126, where his Honor adhered to the same rule.

Lord *Eldon,* however, although he affirmed the decision of the Master of the Rolls, in *Bax* v. *Whitbread* and *Butcher* v. *Butcher* (see 16 Ves. 15, and 1 V. & B. 79), disapproved of the rule there laid down by the Master of the Rolls. In the former of these cases his Lordship observes, "I should pause on giving judgment, if bound to decide upon those authorities with reference to the principle stated in these late cases, now before me, which, in effect (and it would be better to do it in words), destroys all the authorities, as no two cases will probably ever be the same. The sum of 50*l.* being given in one family, and by one will, it is difficult to imagine that the identity of the sum, or the proportion, can afford the ground of determination in another family and upon another will. The motives, also, must be furnished by the same circumstances, whether good conduct or misconduct; a provision by a parent or by a third person; circumstances, if the Court is at liberty to regard them, of utility; for instance, in the case of a power to appoint between two children, and the situation in life of one of them, the effect of the appointment may enable him to do more for the other, than if he had an equal share. If, therefore, it is established that the Court has this authority to consider, whether the execution of such a trust, or power coupled with a trust, is reasonable, it seems to me better to deny the doctrine at once, than to lay down a rule that will destroy it in effect; looking only to sums and figures; excluding circumstances, unless in the same case; and considering in each case, merely, whether the motives and circumstances by which the judgment was so regulated, as among the different objects, were the same. . . . . The result is, that from the time of Lord *Nottingham* the Court has taken upon itself the duty of exercising this discretion; and I should feel great embarrassment, if, on account of the difficulty and the apprehension of not well exercising it, I should step aside from the path of my predecessors, and be deterred from doing it as well as I can; confining myself to the inquiry, whether a case precisely the same had ever occurred; taking as my rule of acting,

that circumstance, instead of the principle decided by former cases."

If a share not illusory comes to one of the objects in default of appointment, it will be considered as an appointment, and no question of illusion will arise: *Wilson* v. *Piggott*, 2 Ves. jun. 351.

An appointment to some only of the objects of a power which does not authorise an exclusive appointment, may be rendered valid, by the partial failure of the appointment in consequence of its being, to the extent of which it fails, a fraud upon the power: *Ranking* v. *Barnes*, 12 W. R. (V.-C. K.) 565.

If, under a power to appoint amongst all the children, a part is well appointed to some, leaving a share not illusory, which is afterwards appointed, so as entirely to exclude one, the last appointment only will be void: *Wilson* v. *Piggott*, 2 Ves. jun. 355.

Where, moreover, there is a gift of legacies by the donee of a non-exclusive power to certain objects of the power, and a gift of the residue of his real and personal property, including that over which he had the power of appointment, to the other objects of the power, the legacies will be chargeable rateably upon the residuary property not included, and that included within the power, and if the legatees thus become entitled even to a merely nominal sum apiece, out of the property included in the power, they will not be able to invalidate the exercise of the power, upon the ground that some of the objects of the power have taken nothing under the appointment. See *Gainsford* v. *Dunn*, 17 L. R. Eq. 405. There a testatrix had power to appoint certain funds by will in favour of her brothers and sisters, Thomas, Mary, Elizabeth, Sarah Rebecca, and Jane Isabel, in such parts, shares, and proportions as she might think fit. The testatrix by her will gave to Thomas, Elizabeth, and Jane Isabel 5*l*. each, and all the rest and residue of her property, of whatever kind and wheresoever situate, and over which she had any power of appointment, to Mary and Sarah Rebecca, their heirs, executors, and administrators. The testatrix left some property of her own, but was not entitled to exercise any power except that above mentioned. It was held by Sir *G. Jessel*, M. R., that the legacies being a charge upon all the residuary property, the will was a valid exercise of the non-exclusive power, inasmuch as none of the objects were left out. "This kind of gift," said his Honor, "has been the subject of frequent judicial decision. I may refer to the case of *Bench* v. *Biles*, 4 Madd. 187, to the case of *Greville* v. *Browne*, 7 Ho. Lo. Ca. 689; and the later cases of *Francis* v. *Clemow*, Kay, 435; and *Gyett* v. *Williams*, 2 J. & Hem. 429, before Vice-Chancellor Wood.

Those cases were cases of a gift of residue of real and personal estate; but the result of the cases is this, that where you find a legacy followed by a gift of the residue of real and personal estate, the word 'residue' is considered to mean that out of which something given before has been taken, and the result is to make the residue a mixed fund, and to charge the legacies proportionally and rateably upon the mixed fund. The question has generally arisen when the personal estate has failed, when it is said the legacy is payable out of the real estate. But in truth it is payable out of both funds, by force of the word 'residue,' and, therefore, to some extent depends on the relative value of the funds. That being so, and applying that doctrine, the sums of 5*l.* each are payable partly out of the testatrix's own property and partly out of the fund appointed. The rule is, that there must be at least a farthing payable out of the fund subject to the power, and, as I have said before, however small the sum appointed may be, the appointment cannot be objected to as being illusory. This is an appointment out of the fund of some portion of the 5*l.* to the brother and each of the two sisters. The consequence is, I hold the power well executed, and each of the ladies will take, subject to the small legacy, the whole of the appointed fund, and thus I can give effect to this lady's will. In fact it is an instance, of which we have so many, of a technicality defeating a technicality, and the true intention of the testator taking effect."

Formerly, an illusory appointment might be justified, and equity would not give relief against it when misbehaviour was shown in the child to whom such illusory share was given: *Maddison* v. *Andrew*, 1 Ves. 57; but this doctrine was overruled in *Kemp* v. *Kemp*, 5 Ves. 855; 1 V. & B. 97.

Where, however, gross inequality is accounted for by the situation of the children, and is humane and wise and discreet, the Court will not call it illusory: *Boyle* v. *The Bishop of Peterborough*, 1 Ves. jun. 310, per Lord *Thurlow*. Thus, an appointment of a very small share to a son, who is an uncertificated bankrupt, would not be looked upon as illusory: *Bax* v. *Whitbread*, 16 Ves. 15. So, if a parent had made a provision for a child, an appointment of a very small share to that child would not be held illusory: *Bristowe* v. *Ward*, 2 Ves. jun. 336; *Smith* v. *Lord Camelford*, 2 Ves. jun. 698; *Long* v. *Long*, 5 Ves. 445; *Spencer* v. *Spencer*, 5 Ves. 367. The provision, it seems, must have been made by the donee of the power: (*Mocatta* v. *Lousada*, 12 Ves. 123;) though Lord *Alvanley* thought that the same result would follow if the provision was made aliunde: *Vanderzee* v. *Aclom*, 4

Ves. 785; and see 16 Ves. 25; *Lysaght* v. *Royse*, 2 S. & L. 151, and 1 V. & B. 97. It is clear, however, that a provision moving from the donor of the power will not be sufficient: *Kemp* v. *Kemp*, 5 Ves. 861.

The interference of Courts of equity, in cases of illusory appointments, was so unsatisfactory in its results, that the Legislature at length interfered, and by the Illusory Appointments Act (1 Will. 4, c. 46), passed June 16, 1830, it was enacted that no appointment, which from and after the passing of the Act should be made, in exercise of any power or authority to appoint any property, real or personal, amongst several objects, should be invalid, or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only should be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment should be valid and effectual in equity, as well as at law, notwithstanding that any one or more of the objects should not thereunder, or in default of such appointment take more than an unsubstantial, illusory, or nominal share of the property subjected to such power; provided that nothing in the Act contained should prejudice or affect any provision in any deed, will, or other instrument creating any such power as aforesaid, which should declare the amount of the share or shares from which no object of the power should be excluded; and provided also, that nothing in the Act contained should be construed, deemed or taken at law or in equity to give any other validity, force, or effect to any appointment than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to or left unappointed to devolve upon any object of such power. See *In re Stone's Estate*, 3 I. R. Eq. 621, and the very interesting remarks of Sir *Geo. Jessel*, M. R., in *Gainsford* v. *Dunn*, 17 L. R. Eq. 405.

Lord *St. Leonards* has observed, with reference to this Act, that, where it is intended that a party shall have power to divide a fund among several objects in *substantial* proportions, according to his discretion, but shall not be at liberty to give a merely nominal share to any, the smallest sum which the person creating the power should wish each of the objects in any events to have, should be named, and it should be declared that the donee of the power shall not be at liberty to appoint a less sum to any of the objects. (1 Pow. 545.)

The statute as to illusory appointments (1 W. 4, c. 46) has a retrospective operation on any power of appointment in esse at the time of the passing of the Act, but executed afterwards (*Reid* v. *Reid*, 25

Beav. 469, 480); it does not, however, make valid an appointment which previous to the Act would have been invalid, in consequence of the exclusion of certain objects of a power, not authorising an exclusive appointment: *Minchin* v. *Minchin*, 3 Ir. Ch. Rep. 167.

The law upon this subject has been recently altered by 37 & 38 Vict. c. 37 (passed 30th July, 1874), entitled An Act to Alter and Amend the Law as to Appointments under Powers not Exclusive, whereby, after reciting that by deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects in such manner that no one of the objects of the power can be excluded, or some one or more of the objects of the power cannot be excluded, by the donee of the power from a share of such property, but without requiring a substantial share of such property to be given to each object of the power who cannot be excluded. And that instruments intended to operate as executions of such powers are frequently invalid in consequence of the donee of the power appointing in favour of some one or more of the objects of the power to the exclusion of the other or others or some other or others of such objects, and that it was expedient to amend the law so as to prevent such intended appointments failing, it is enacted That no appointment, which from and after the passing of the Act should be made in exercise of any power to appoint any property real or personal amongst several objects, should be invalid at law or in equity on the ground that any object of such power had been altogether excluded, but every such appointment should be valid and effectual, notwithstanding that any one or more of the objects should not thereby or in default of appointment take a share or shares of the property subject to such power (sect. 1). And there is a proviso that nothing in the Act contained should prejudice or affect any provision in any deed, will, or other instrument creating any power, which should declare the amount or the share or shares from which no object of the power should be excluded, or some one or more object or objects of the power should not be excluded" (sect. 2).

COUNTESS OF STRATHMORE *v.* BOWES.

March 2nd & 3rd, 1789.

[REPORTED 1 VES. JUN. 22.]

S. C., on the first hearing, 2 Bro. C. C. 345; 2 Cox, 28, affirmed on appeal, 6 Bro. P. C. 427, Toml. ed.

FRAUD ON MARITAL RIGHTS.]—*A woman, pending a treaty of marriage with A., settled all her property to her separate use, with his approbation; a few days after, B., by stratagem, induced her to marry him, the day after she first thought of it: B. had no notice of the settlement. The settlement was established, and a deed of revocation obtained by duress set aside.*

The burthens, to which a husband is liable, are a consideration for his marital rights, upon which, therefore, fraud may be committed.

Conveyance by a woman under any circumstances, and even the moment before marriage, is good, primâ facie: is bad only if fraudulent, as where it is made pending the treaty, without notice to the intended husband.

LADY STRATHMORE being seised and possessed of great property, both real and personal, pending a treaty of marriage with Mr. Grey, conveyed all her real, and assigned all her personal, estate to trustees for her sole and separate use, notwithstanding any future coverture. This settlement was prepared with the approbation of Grey.

A few days after the execution, hearing that Mr. Bowes had fought a duel on her account with the editor of a newspaper, who had traduced her character, she determined to marry him, and the marriage took place the next day. Bowes had no notice of the settlement.

There were two bills: an original bill by Lady Strathmore, to set aside a deed revoking the settlement, as having been obtained by duress; and a cross bill by Mr.

Bowes, to set aside the settlement, as against the rights of marriage, and a fraud upon him, and to establish the deed of revocation.

An issue was directed, to try whether the deed of revocation had been obtained by duress; and the verdict in the Common Pleas was against the deed. The cause coming on upon the equity reserved, Mr. Justice *Buller*, sitting for the Lord Chancellor, decreed in favour of Lady Strathmore, and dismissed the cross bill with costs.

It came on again, upon the petition of Mr. Bowes, for a rehearing, and reversal of that decree so far as it dismissed the cross bill.

Mr. *Richards*, for Mr. Bowes.—The question is, whether this settlement, made before marriage, is valid or not, as being in derogation of the common rights of marriage. A wife, by the marriage contract, becomes extinct, from the nature of it, for several civil purposes with regard to which she merges in the husband. He becomes liable to all her debts, and answerable for all her acts that do not amount to felony; and even for that, if committed in his presence; because her mind is supposed to be under his coercion. In order to enable him to answer this, he has by the law all her property. It is absurd to say, the wife shall by her own act deprive the husband of what the law has given him. It was not decided till lately, that a legacy to a wife for her sole and separate use would have been good without the interposition of trustees; and this case is much stronger, because to be construed more strictly than a devise; nor can the interposition of trustees make any difference, because it cannot alter the nature of the thing. As to his not having made any settlement on her, many marriages are made without any: and in this case it could not be necessary; for she had 10,000*l.* or 12,000*l.* a year, a great estate for life, and much personal property. There is another principle very material: marriage by the law of England, gives the husband the whole dominion over the property, and also over the person of his wife, except as

to murder; for, by the old law, he could not be punished for cruelty towards her. The civil existence of the wife merged in that of the husband: he is the head of the family; to make another, would be against the policy of the law. If the wife can by her own act, against the consent of the husband, make herself independent of him, it will destroy that subordination so necessary in families, which is analogous to that in the state, and tends to support it; for if Lady Strathmore is right in this, the husband is become a cipher in his own house; for he cannot educate his children, or do any other act, which by law he has a right to do. The deed was executed on the 10th or 11th of January, and the marriage took place upon the 17th. If the deed had been meant fairly in contemplation of marriage, the husband would have been a party to it: there is no instance to the contrary; and it is necessary, in order to testify the consent of the husband. In *Howard* v. *Hooker*, 2 Ch. Rep. 81, a settlement by the wife, before marriage without notice to the husband, was set aside. In *Lance* v. *Norman*, 2 Ch. Rep. 79, a bargain entered into by the wife, before marriage, was set aside, because the husband was not a party; and this case is stronger: because there, the wife was only made poorer; but here she is made quite independent of the husband. In *Carleton* v. *Dorset*, 2 Vern. 17, the estate was made over, before marriage, to trustees without privity of the husband; and a conveyance was decreed to the six-clerk, and the personal property to be paid into Court for the husband, because in derogation of the rights of marriage; and in *Edmonds* v. *Dennington*, cited in the foregoing case, a deed of settlement made before marriage, without notice to the husband, was set aside. In *Poulson* v. *Wellington*, 2 P. Wms. 535, Lord *King*, said, that if a woman before marriage settled her property, without giving notice to the intended husband, it would, as to him, be fraudulent and void. In *Cotton* v. *King*, 2 P. Wms. 358, 674, Lady Cotton, widow, had ten children by her first husband, and before the second marriage, by indenture settled part of her fortune in their favour

(reserving, however, a considerable portion), without notice to the husband. King filed a bill to have this deed delivered up to him: but as the transaction of making the deed had been public; as she had so many children by her first husband, for whom it was reasonable to provide before she entered into a second marriage; and as the second husband was a person in mean circumstances, and had received a good fortune with her; and as she had reserved something to herself, King's bill was, for these reasons, dismissed. This decision shows, that if it had not been for the benefit of the children of the first marriage, and on account of these several circumstances, it would not have been good. Upon these cases, and the principle of the thing, this settlement is void, as being in derogation of common right. It is to be observed, that in all these cases something was reserved; here there is nothing; for Lady Strathmore has conveyed all her real, and assigned all her personal, property to trustees, for her own use; and the circumstance of appointing trustees will not alter the nature of the thing, though it drives us into a Court of equity.

Mr. *Mansfield*, Mr. *Hardinge*, Mr. *Law*, and Mr. *King*, for Lady Strathmore.—Lady Strathmore is in possession by a deed to trustees, giving her own property to her use. It was done in contemplation of marriage with another person; therefore not fraudulent as to Mr. Bowes, unless any deed by a feme sole, by which she disposes of her property, shall be construed to be fraudulent, if not communicated to any future husband. Want of communication is the only circumstance that can be alleged; but that is very different from concealment, for which there can be no pretence here. It is true, a man by marrying a woman gains a dominion over her property, and in a great degree over her person, though perhaps not to the extent contended; but he had nothing to do with this property, for it was not in her at the time of the marriage, having been previously vested in trustees: and as every man knows that a woman may settle her property so that a future husband shall not be able to

touch it, Mr. Bowes ought to have inquired about it beforehand. There is no pretence of actual imposition upon him, nor even upon Grey. The deed was prepared by a gentleman of the first credit; she had several children by Lord Strathmore; she was going to marry Mr. Grey, and make this previous settlement for her children; and she acted meritoriously and honourably in so doing. The deed was with Grey's knowledge and under his direction; his approbation of it appeared by his having called to know when it would be ready, and to hasten it; and it was prepared, though not executed, a month before the time of the marriage, therefore not fraudulent as to Mr. Grey; and there is no authority for vacating a settlement made by a woman for the protection of her children without fraud. Mr. Bowes made no settlement on Lady Strathmore; neither did King upon Lady Cotton, in the case cited (which was one of the grounds of the decision in that case), though Bowes had some fortune by a former wife. He took Lady Strathmore as she then was, with what she then had; therefore there is nothing fraudulent, or that can entitle him to relief in this Court. Knowing that she was a woman subject to sudden and violent impulses of generosity, he made use of a vile artifice to obtain her by means of a sham duel (for it is in every stage of the cause admitted to have been so) with the proprietor of a newspaper, who had traduced her; and the emotion and precipitation which he caused by this artifice, was the cause which prevented the communication of the actual situation of her fortune. After this, Mr. Bowes made use of the most reproachful means to set aside this deed: and the verdict was, that the revocation was obtained by violence. He would not have done this, had he not thought the deed a good one. The reason of the case is (nor is there a dictum to the contrary), that where a woman about to marry, represents herself as possessed of a fortune which she had previously disposed of, this Court will not permit the husband to be cheated. *Howard* v. *Hooker*, to which all the cases refer, was of that kind, being a specific fraud

upon the husband. The marriage had been broken off, and was brought on again by the interposition of friends, upon the idea of the husband that he was to enjoy the wife's fortune, in consideration of which he made a settlement on her of 500*l.* a year. In *Lance* v. *Norman*, the wife before marriage entered into a recognizance, concealed from the intended husband, and the object of it was to enable the creditor, who was her own brother, to distress the husband; and they had made an attempt to defraud him before, by getting him to sign a deed which was in Latin, that he might not understand it, telling him it was only a memorandum. In *Carleton* v. *Dorset*, the wife conveyed all her fortune to trustees for her own use, with permission to herself to appoint, and in default of appointment, to her own right heirs, and afterwards married: here the case was, that the husband had assurance that he was to enjoy the estate of his wife; and the decree was upon the ground that it was a trust for her, with power to appoint; and as she made no appointment, it was resolved to be a trust for her husband. Besides, in that case, the fortune was paid into court, and a reasonable allowance was to be made to her. It has been remarked, that the foundation of the decree in *King* v. *Cotton* was, that it was to provide for children, which has been said to be the only case in which this can be good: but the settlement on children, or on any one else, will not make any difference; the question is, what right the husband has; if he has any right, notwithstanding any voluntary disposition without notice to him, because he was deceived, the manner in which that deceit was practised will make no difference with respect to him; for the ground for relief must be, that he was cheated, because the settlement was not communicated to him. *King* v. *Cotton* is for Lady Strathmore; for Lady Cotton had disposed of her fortune so as to put it quite out of the power of her husband; and yet the settlement was established. As to *Edmonds* v. *Dennington* (*a*), Mr. Justice *Buller* suspected that it was misreported in Vernon, where it is only a loose note cited at the bar; and, on inspecting the

(*a*) And see 1 My. & K. 621

register, the decree turns out to be quite different from that report; for the deed was established upon the ground of distinct notice to the husband; and, in that case, as in this, the settlement was all her property. These cases, therefore, only go on the ground of fraud of the husband, of which there is no suggestion here. But this is not a question upon a deed executed by a future wife pending a treaty of marriage with a future husband; nor upon a deed made in prejudice generally of marital rights; nor of a settlement by a husband, by which he pays for his future power over the fortune of his wife. Suppose a husband to say he is indifferent as to the fortune of his wife, in order to appear disinterested; suppose, having a fortune, he makes no settlement; and suppose the marriage instantaneous, no time being given for communication or concealment, is it enough for the husband to say, his secret hope was disappointed? The only pretence here is, that he expected her fortune would have been greater than it proved, which expectation he did not disclose. To make this deed valid, is only to put a safeguard in her hands against the consequences of an improvident marriage; and she had a right, while sui juris, to baffle, for so much, what would otherwise have been the marital power of her husband. It is enough for us to say, Mr. Bowes was not cheated.

Lord Chancellor Thurlow.—The mere question seems to be, what is the true foundation for setting aside an instrument primâ facie good? Can less be imputed to it than fraud? Or can it be void upon the notion of general policy, as has been urged for Mr. Bowes? If not, must not fraud be imputed? and, if so, will the circumstances of its being made in contemplation of marriage affect it with fraud? Suppose a relation had given 10,000*l.* for her sole and separate use; if she had represented it as her own absolutely, so that, upon a marriage, it would have gone to her husband, this Court would have compelled the trustees to give it to the husband, but not otherwise (*a*); nor is there any difference between a

(*a*) See *Ashton* v. *M'Dougall*, 5 Beav. 66.

fortune so circumstanced by an act of her own, or of the donor. Consider what will be the effect of this void deed of revocation? If he had joined with her to revoke that settlement and appoint new uses, he could not have rescinded that afterwards; because he had affirmed the deed by acting upon it. If he had acted honestly upon it, as in the case I have put, he could not have set that aside; his counsel are to show that he may, because he has acted dishonestly upon it, which at present I think rather a vain attempt.

Mr. *Partridge* was to have argued for Mr. Bowes, by way of reply, at his own request, but could not attend.

Lord Chancellor Thurlow.—I never had a doubt about this case. If it is to be considered upon the ground of its being against a rule of judicial policy, the arguments for Mr. Bowes would have had great weight. The law conveys the marital rights to the husband, because it charges him with all the burthens, which are the consideration he pays for them; therefore, it is a right upon which fraud may be committed. Out of this right arises a rule of law that the husband shall not be cheated on account of his consideration.

A case of this kind came before me a few days ago (*a*). A woman adult, about to marry an infant, made a settlement, in contemplation of that marriage, in which he joined, though an infant, for the purpose of expressing his consent. As it was upon fair consideration, and no fraud to draw him in as an infant, I thought the circumstance of its being fair would bind him, though as an infant, not capable of consenting; according to which I held the settlement good, as she was capable of conveying; and as it was a public and open transaction, with the consent of the family, and consequently no fraud, though his being privy to it would not have concluded him from any rights as being an infant.

(*a*) *Slocombe* v. *Glubb*, 2 Bro. C.C. 545.

A conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is primâ

facie good, and becomes bad only upon the imputation of fraud. If a woman, during the course of a treaty of marriage with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good primâ facie, because affected with that fraud.

As to the morality of the transaction, I shall say nothing to that. They seem to have been pretty well matched. Marriage in general seems to have been Lady Strathmore's object; she was disposed to marry anybody, but not to part with her fortune. This settlement is to be considered as the effect of a lucid interval, and, if there can be reason in madness, by doing this she discovered a spark of understanding.

The question which arises upon all the cases is, whether the evidence is sufficient to raise fraud. Even if there had been a fraud upon Grey, I would not have permitted Bowes to come here to complain of it. But there was no fraud, even upon Grey, for it was with his consent; and so I cannot distinguish it from a good limitation to her separate use. Being about to marry Grey, she made this settlement with his knowledge; and the imputation of fraud is, that having suddenly changed her mind and married Mr. Bowes, in the hurry of that improvident transaction she did not communicate it to him; but there was no time, and could be no fraud, which consists of a number of circumstances. It is impossible for a man marrying in the manner Bowes did, to come into equity and talk of fraud. Therefore, the decree must be affirmed, with costs; but let him have all just allowances as to what he paid when in receipt of the profits, and as to the annuities, which are declared not to be disturbed by the decree.

In the well-known case of *Strathmore* v. *Bowes*, the rule upon which Courts of equity act in setting aside a settlement made by a woman of her own property previous to marriage, in violation or fraud of the marital rights of her intended husband, is well laid

down by Lord *Thurlow*. "A conveyance by a wife," observes his Lordship, "whatsoever may be the circumstances, and even the moment before the marriage, is primâ facie good, and becomes bad only upon the *imputation of fraud*. If a woman, *during* the *course of a treaty of marriage* with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good primâ facie, because affected with that fraud."

The case, however, of *Strathmore* v. *Bowes*, does not come within the principle of those cases in which, according to the rule as laid down by Lord *Thurlow*, a Court of equity will set aside a settlement of a woman's property, made by her previous to marriage; for it will be observed, that the settlement was made by Lady Strathmore with the consent of Grey, her then intended husband, and not during the course of a treaty of marriage with Bowes, whom she afterwards married, and it was, therefore, not a fraud upon him. The settlement, to use Lord *Thurlow's* words, was primâ facie good, and there was no imputation of fraud to render it bad. "*Strathmore* v. *Bowes*," observes Lord *Loughborough*, "went upon this, that the deed was honest and proper, being made in contemplation of a marriage with another person, and with the consent of that person:" *Ball* v. *Montgomery*, 2 Ves. jun. 194; see, also, *M'Donnell* v. *Hesilridge*, 16 Beav. 346. It is necessary, therefore, for a person impeaching a settlement, to prove that, at the time of its execution, he was *the then intended husband*, otherwise it will not be set aside: *England* v. *Downs*, 2 Beav. 522.

It is clearly settled, that if a woman, during a treaty for marriage, holds herself out to her intended husband as entitled to property, which will become his upon the marriage, and then makes a settlement of it without his knowledge or concurrence, actual fraud will be imputed to her, and the settlement will be set aside in a Court of equity. "If," observes Lord *Langdale*, M. R., "a woman entitled to property enters into a treaty for marriage, and, during the treaty, represents to her intended husband that she is so entitled, that, upon the marriage, he will become entitled jure mariti; and if, during the same treaty, she clandestinely conveys away the property, in such manner as to defeat his marital right and secure to herself the separate use of it, and the concealment continues till the marriage takes place, there can be no doubt but that a fraud is thus practised on the husband, and he is entitled to relief. The equity which arises in cases of this nature depends upon the peculiar circumstances

of each case, as bearing upon the question, whether the facts proved do or do not amount to sufficient evidence of fraud practised on the husband. It is not doubted that proof of direct misrepresentations, or of wilful concealment, with intent to deceive the husband, would entitle him to relief: " *England* v. *Downs*, 2 Beav. 528; see also *Howard* v. *Hooker*, 2 Ch. Rep. 81; *Carleton* v. *The Earl of Dorset*, 2 Vern. 17; *S. C.*, 2 Cox, 33.

It was observed by Mr. Justice *Buller*, when *Strathmore* v. *Bowes* was before him, that " Fraud consists in falsely holding out that a woman has an estate unfettered, and that the husband will be of course entitled to it. No case has yet established, that all conveyances by a wife before marriage are void, merely because not communicated to the husband: " 2 Bro. C. C. 350; 2 Cox, 29. And again, he says, " It is necessary to show other facts, and that the husband is actually deceived and misled; and that the bare concealment is not sufficient: " 2 Cox, 30. These dicta, however, of Mr. Justice *Buller* can scarcely be supported, although there have been some cases in which, under peculiar circumstances, it has been held that a bare concealment by a woman from her intended husband, of a gift or a settlement of part of her property made during the treaty for a marriage, was not sufficient evidence of fraud, so as to render the settlement void as against the husband. Thus, in *Thomas* v. *Williams*, Mos. 177, a woman, during a treaty of marriage, released a legacy to which she was entitled, without the knowledge of her husband. Lord *King*, however, refused to set aside the release, because it did not appear that he ever inquired after the legacy. So also in *De Mandeville* v. *Crompton*, 1 V. & B. 354, a daughter, after instructions were given for her marriage settlement, by which she assigned all monies, debts, bills, bonds, *notes*, and other securities for money, and chattels real, and other chattels, and personal estate, to trustees, upon trusts under which her intended husband took only a partial and contingent interest, without his knowledge cancelled a promissory note for 2000*l.*, which had been given to her, without consideration, about seventeen years before, by her mother, then a widow, as a provision in case she should marry again; Lord *Eldon* held, that the husband was entitled to no relief with regard to the note. " My opinion," observed his Lordship, " is that the marriage was not upon any representation as to the amount of the property, that it should be in *no way diminished*, or that this note should make part of the settlement; and I should go beyond any precedent by holding that here was a misrepresentation leading to marriage, which was either

fraudulently or substantially defeated by what took place afterwards with reference to this note."

However, in *Goddard v. Snow*, 1 Russ. 485, a woman, ten months before marriage, but after the commencement of that intimate acquaintance with her future husband which ended in marriage, made a settlement of a sum of money which he did not know her to be possessed of. The marriage took place, she concealing from him both her right to the money and the existence of the settlement. Ten years afterwards she died, and after her death the husband filed a bill to have the money paid to him. It was argued, on behalf of the defendants, that, as the husband did not know of the existence of the sum of money, and was, therefore, not induced to contract the marriage on the notion that it would be subject to his marital rights, no fraud, such as the authorities held to be necessary, had been committed; that there was, at the utmost, only concealment, and that concealment alone was not sufficient to avoid a settlement confessedly valid at law. Lord *Gifford*, M. R., however, held that the settlement was void against the husband, as a fraud upon his marital rights; and his Lordship said, that the opinion of Lord *Thurlow*, in *Strathmore* v. *Bowes*, was, that if a woman, contemplating marriage with an individual, made a settlement of her property on herself, reserving to herself the dominion over it, and *concealed* that settlement from her husband, the settlement was a fraud on his marital rights, which he was entitled to avoid. See *St. George* v. *Wake*, 1 My. & K. 622, where Lord *Brougham* says, that the principle was carried further in *Goddard* v. *Snow* than in any other case. See also *Downes* v. *Jennings*, 32 Beav. 290; *Prideaux* v. *Lonsdale*, 4 Giff. 159; 1 De G. Jo. & Sm. 433; *Chambers* v. *Crabbe*, 34 Beav. 457.

It has been supposed that a settlement by a widow upon her children by a former marriage, even if made during the treaty for a second marriage, without the knowledge of her intended husband, is valid, because the object of the settlement, it has been said, is meritorious. *Hunt* v. *Matthews*, 1 Vern. 408, and *King* v. *Cotton*, 2 P. Wms. 674, Mos. 259, have been cited as supporting the proposition; it appears, however, by an extract from the decree in Mr. Raithby's edition of Vernon, that the husband, in *Hunt* v. *Matthews*, *consented* to the settlement being made by his intended wife upon her children by a former marriage; and in *King* v. *Cotton*, the settlement was made by Lady *Cotton* upon the children of a former marriage, *previous to her entering upon a treaty for a second marriage.*

These cases, therefore, only decide that a settlement is valid

if made by a woman upon her children by her former marriage, either with the consent of the intended husband, or without his consent or knowledge, if made *previous to the treaty for* marriage; but it is conceived that a provision for children would not render a settlement valid which without it would be fraudulent; for, although in the execution of a settlement, so far as it makes provision for her children, a woman may perform a moral duty towards her children, she has no right to act fraudulently towards her husband; and she can, in such circumstances, only reconcile all her moral duties by making a proper settlement on herself and her children, with the knowledge of her intended husband; see *England* v. *Downs*, 2 Beav. 528, 529; in which case however, the settlement made by a widow upon herself and the children of a former marriage was held not to be fraudulent, because it was not proved that the person she afterwards married was, at the time of the execution of the settlement, "*her then intended husband.*"

In *Taylor* v. *Pugh*, 1 Hare, 608, where a husband filed a bill to set aside a settlement made, as he alleged, in fraud of his marital rights, it was argued, that, as he was ignorant that his wife had any property, and as she had practised no actual deception upon him, a Court of equity ought not to interfere; but Sir *James Wigram*, V. C., although he decided against the husband upon other grounds, clearly intimated his opinion that those arguments were unsound. "It was argued," observed his Honor, "for the defendants, who resist this claim, that the plaintiff was ignorant, until after the marriage, that the wife was possessed of the property in question; and I was referred to cases, in which the Court had apparently laid some stress on that circumstance, as a ground for refusing relief to the husband."

"In *De Mandeville* v. *Crompton*, Lord *Eldon* made the important observation, that, in the absence of any representation having been made as to specific property, no implied contract is raised on the part of the lady during the treaty of marriage, that her property, as it existed at the time of the commencement of the treaty, shall be *in no way diminished*. This undoubtedly shows Lord *Eldon's* opinion to be, that it is not every alienation of the wife's property, during the treaty, which can be regarded as fraudulent, only because the husband was not a party to it. But I should certainly have great difficulty in applying the proposition so laid down by Lord *Eldon* to a case in which every farthing of the wife's property was, without the knowledge of the husband, wholly withdrawn from his control and settled on herself, her children, or her appointees, to the total exclusion of the husband. A very

special case must be made out before the Court would carry the proposition so far. I think Lord *Eldon* meant only to decide, that, there being no implied contract on the part of the lady, that her property should not be in any way diminished, it is for the Court to determine, whether having regard to the condition in life of the parties, and the other circumstances of the case, a transaction complained of by the husband should be treated as fraudulent or not."

"I think another argument on behalf of the defendants was also carried beyond its just limits, in contending that actual fraud or deception on the husband must be proved. Notwithstanding there are some dicta which may at first be considered as implying the contrary (but which may, I think, be explained), I take the rule of the Court to be correctly stated in Mr. Roper's Treatise, vol. 2, p. 162: 'Deception will be inferred if, after the commencement of the treaty for marriage, the wife should attempt to make any disposition of her property without her intended husband's knowledge or concurrence.' This way of stating the law does not exclude inquiry into the circumstances by which the apparent deception may be explained; nor does it conflict with the modern cases to which I was referred. I shall, as I understand those cases, content myself with referring to the valuable note of the learned editor (Rop. Hus. & Wife, vol. 2, p. 166, n.), in support of the general proposition I have cited.

"Several circumstances would certainly appear to have been sometimes thought material as negativing the imputed fraud; such as the poverty of the husband —the fact that he has made no settlement upon the wife—the reasonable character of the settlement, as in the case of a settlement upon the children of a former marriage—and the ignorance of the husband that his wife possessed the property. . . . I could not give my individual assent to the sufficiency of any of the reasons I have mentioned. The poverty of the husband—the absence of any settlement upon the wife—the reasonable manner in which she desires to deal with her property, may be very material considerations for the guidance of the parties in determining in what manner the wife's fortune should be settled; but why they should constitute a reason for concealing the arrangement from the husband, I cannot comprehend. It might be very proper to bring these considerations to the attention of the intended husband. He might be told that the lady has a certain fortune, but regard being had to the claims upon her, and to his circumstances, the settlement ought to be made in a particular way; but I cannot comprehend the reasoning, which says, that any one of the reasons suggested is a sufficient ground for

practising concealment upon the husband, or treats such concealment as immaterial. So, also, with respect to ignorance of the husband of the property of the wife —that, no doubt, materially lessens his disappointment at finding the wife's fortune has been withdrawn from his control; but the equity is not founded upon his disappointment; for, if that were so, it would follow that his ignorance of the existence of the property would always be an answer, however that ignorance was produced; the equity would never arise where the wife had contrived to conceal her property from the husband; but this is not so, for the cases clearly show that practised concealment by the wife will be treated as a fraud on the husband."

But a gift or settlement, by a woman, of her property, during the treaty for marriage, will not be set aside, if the husband knew of the gift or settlement before the marriage. Thus, in *St. George* v. *Wake*, 1 My. & K. 610, where a lady, during a treaty for a marriage which afterwards took effect, made a voluntary assignment of part of her property to her sister, her husband filed a bill to set it aside; but he did not allege that the transaction was concealed from him, or that he was ignorant of the assignment having been made, at the time of the marriage. Sir *J. Leach*, M. R., held that the husband, who was, under the circumstances, presumed to have had notice of the assignment before his marriage, was not entitled to set it aside on the ground of fraud. And his Honor stated, that he had looked into the authorities, and had not found any case which went the length of establishing the proposition, that if a person, who had entered into a treaty of marriage with a lady, knew of a gift made by the lady, pending such treaty, and nevertheless thought fit to marry her, the gifts could be considered as void in this Court. At law, if a lady secretly disposed of a part of her property, after the contract of marriage, the contract was thereby avoided; and proof of this secret disposition was a valid defence, if an action were brought against the intended husband for breach of the promise of marriage. This decision, on appeal, was affirmed by Lord *Brougham*. See also *Ashton* v. *M'Dougall*, 5 Beav. 56; *Griggs* v. *Staplee*, 2 De G. & Sm. 472; *Wrigley* v. *Swainson*, 3 De G. & Sm. 458. See 1 My. & K. 619.

The seduction by a man of his intended wife, may be a reason why a Court of Equity should not set aside a settlement made by her before marriage. Thus, in *Taylor* v. *Pugh*, 1 Hare, 608, where a man had induced his intended wife to cohabit with him previously to marriage, Sir *J. Wigram*, V. C., refused to set aside a settlement of her property, although executed without his knowledge,

during the treaty for the marriage, because the husband, before the marriage, had put it out of the power of the wife effectually to make any stipulation for the settlement of her property, by his conduct towards her. "Retirement," said his Honor, "from the marriage on her part was impossible. She must have submitted to a marriage with her seducer, even although he should have insisted on receiving and spending the whole of her fortune." But see *Downes* v. *Jennings*, 32 Beav. 290.

The concurrence of the husband in making a settlement, even though he be a minor, will preclude him from taking any objections to it: *Slocombe* v. *Glubb*, 2 Bro. C. C. 545; but see *Nelson* v. *Stocker*, 4 De G. & Jo. 458. In a recent case, however, a settlement made by a woman of her personal property after her engagement to be married, was set aside at the suit of the husband, although he was told before the marriage that she had executed a settlement affecting her property, it appearing that neither she nor her husband was accurately informed of the nature and effect of the trusts of the settlement. *Prideaux* v. *Lonsdale*, 4 Giff. 159, 1 De G. Jo. & Sm. 433.

If a husband acquiesces in, or confirms, a settlement, he will not afterwards be allowed to dispute it: *Maber* v. *Hobbs*, 2 Y. & C. Exch. Ca. 317; *England* v. *Downs*, 2 Beav. 535; *Ashton* v. *M'Dougall*, 5 Beav. 56; *Grazebrook* v. *Percival*, 14 Jur. 1103; *Loader* v. *Clarke*, 2 Mac. & G. 382. In *Downes* v. *Jennings*, 32 Beav. 290, 523, it was held that delay in instituting a suit for two and a half years after the discovery by the husband of the settlement did not operate as a bar to the relief sought.

And it seems that the representatives of a husband after his death have no equity against the wife, if he dies without having discovered the fraud on his marital rights, *Grazebrook* v. *Percival*, 14 Jur. 1103.

If a woman gives a security to a *volunteer*, prior to marriage, without the consent of the intended husband, it may be set aside by him. Thus, in *Lance* v. *Norman*, 2 Ch. Rep. 79, the wife of Lance the plaintiff, the day before her marriage, was persuaded to enter into a recognizance of 2000*l.* without defeazance, to her brother, the defendant, without the privity or consent of the plaintiff. The Court, being assisted by the judges, held, that the recognizance was entered into whereby to defraud the plaintiff; and decreed it to be set aside and vacated on the record thereof, and granted a perpetual injunction against it.

But where a woman, about to marry, gave a bond for *valuable consideration*, although without her intended husband's knowledge, it was held by Lord *Hardwicke*, that the husband could not be relieved against it. "If," ob-

served his Lordship, "a woman about to marry parts with part of her property, or gives a security or assignment, they are relievable against in this court; but where a debt is contracted for *valuable consideration*, though concealed from the husband, it is no fraud on the marriage. But concealment of such securities or debts is not to be encouraged:" *Blanchet* v. *Foster*, 2 Ves. 264; see also *Llewellin* v. *Cobbold*, 1 Sm. & Giff. 376.

It is presumed that a woman about to be married, availing herself of the powers conferred upon her by the Married Woman's Property Act, 1870 (33 & 34 Vict. c. 93), ss. 3, 4, 5, to invest in the funds, joint stock or other companies, or in societies duly registered, certified, or enrolled, will still come within the rule laid down in *Strathmore* v. *Bowes*, if she does not obtain the concurrence of her intended husband.

A secret settlement made by a woman whilst under a treaty for marriage, though liable to be set aside in equity, was not necessarily void in a court of law. Thus, in *Doe d. Richards* v. *Lewis*, 11 C. B. 1035, A., pending a treaty of marriage between herself and B., without B.'s knowledge, made a settlement of certain leaseholds upon herself for life, remainder to C. her son by a former marriage, remainder over to D. It was held by the Court of Common Pleas that this deed was not avoided by the marriage under the statute of 27 Eliz. c. 4, the husband not taking as a purchaser.

It seems to be doubtful how far Courts of equity will interfere in favour of women, against secret acts of the husband immediately before marriage to deprive them of their right to dower. It is, however, said by Lord C. B. *Gilbert*, that a conveyance in trust privately made by the husband on the eve of marriage, for the purpose of barring dower, would be decreed fraudulent, as being designed to deprive the wife of the provision given her by the Common law: Lex Prætor. 267; 1 Bright, H. & W. 356; and see *Drury* v. *Drury*, Wilmot's Opinions, 177, 4 Bro. C. C. 506, n. Lord *Hardwicke* however treats it as clear, "that if a man, before marriage, conveys his estate privately, without the knowledge of his wife, to trustees, in trust for himself and his heirs in fee, that will prevent dower:" *Swannock* v. *Lyford*, Co. Litt. 108, n. 1, and see *Banks* v. *Sutton*, 2 P. Wms. 700.

It has also been observed that the reasons for which it has been held that a conveyance privately made by a woman during a treaty of marriage is *primâ facie* fraudulent and void, do not apply with equal force to a conveyance made under similar circumstances by the intended husband; because estates are now most commonly conveyed or settled so as to prevent dower from attaching, it is not necessarily to be presumed

that the marriage was contracted by the woman in the expectation of becoming entitled to that provision, unless it appears that representations to that effect were made to her (1 Bright, H. & W. 357); and perhaps these reasons would apply more forcibly in the case of women married since the Dower Act (3 & 4 Will. 4, c. 105) (which puts dower entirely in the power of the husband) came into operation. See also *M'Keogh* v. *M'Keogh*, 4 I. Eq. 338.

LADY ELIBANK *v.* MONTOLIEU.

April 16*th*, 19*th*, 1799. *Feb.* 19*th*, 1801.

[REPORTED 5 VES. 737.]

WIFE'S EQUITY TO A SETTLEMENT.]—*Upon the bill of a married woman, entitled to a share of the personal estate as one of the next of kin of the intestate, against her husband and the administrator, the latter claiming to retain towards satisfaction of a debt by bond from the plaintiff's husband to him, it was declared he was not entitled to retain: but that the plaintiff's share was subject to a further provision in favour of her and her children, the settlement on her marriage being inadequate to the fortune she then possessed; and it was referred to the Master to see a proper settlement made on her and her children, regard being had to the extent of her fortune and the settlement already made upon her.*

IN 1795, Lady Cranstown died intestate, possessed of large personal property, leaving two brothers and two sisters her next of kin. Lewis Montolieu, one of her brothers, took out letters of administration to her.

The bill was filed by Lady Elibank, one of the sisters, against her husband Lord Elibank and against Montolieu, *praying an account of the plaintiff's share, and that it may be settled on her and her family.*

The defendant Montolieu, by his answer, claimed to retain Lady Elibank's share, towards satisfaction of the debt due to him from Lord Elibank by two bonds—one dated the 31st of May, 1783, for 12,217*l.* 9*s.* 9*d.*; the other, dated the 14th November, 1794, for 1000*l.*—upon

the ground of the *provision made for the plaintiff by the settlement previous to her marriage with the defendant Lord Elibank*, in 1776. By that settlement, the sum of 12,000*l.* and 5000*l.* New South Sea Annuities were settled in trust for Lord Elibank for life; and after his decease, for Lady Elibank for life, as a jointure, and in lieu of dower or thirds; and after the decease of both, in trust for the children. The sum of 4000*l.* New South Sea Annuities was settled in trust for her separate use for life; and after her death, for her children: and 2000*l.* 5*l.* per cent. Bank Annuities for her separate use for life; and after her death, for her children, as she should by will appoint. All these sums were her property before marriage. The settlement also gave her some contingent interests.

In the entail of Lord Elibank's estate, a power was reserved to charge 200*l.* a year jointure, and 50*l.* a year to each of his younger children, not exceeding in the whole 200*l.* a year, under a condition, that the estate should be chargeable with only one jointure at a time; and that, if the power of charging for children had been exercised by a preceding heir in tail, the heir in possession should not charge for his younger children. The defendant Lord Elibank, by his answer, stated that a former Lord Elibank did charge to the full extent of that power.

The *Solicitor-General*, Mr. *Grant*, and Mr. *Alexander*, for the plaintiff.—The plaintiff desires an account of the personal estate of Lady Cranstown, and that a provision may be made for her. The defendant Montolieu insists, that is not to be done, because he is a creditor of her husband; contending that this case is out of the usual rule upon which the Court acts for a wife; and that there is no necessity to come to this Court, the fortune not being in Court nor under the control of the Court. In *Jewson* v. *Moulson* (*a*), Lord *Hardwicke* held, that is not a necessary ingredient to enable the Court to act upon the property; and that this Court would interfere to prevent the husband from obtaining it through a Court of concurrent jurisdiction, as the Ecclesiastical Court; because that

(*a*) 2 Atk. 417.

Court cannot give the wife a remedy; though he doubted where it could be got at without the aid of this Court, or a court of concurrent jurisdiction; and he states that the rule is as old as the time of King Charles I., and cites a case from Tothill (*a*). There have been many instances of an injunction to restrain the husband from proceeding in the Ecclesiastical Court, refusing to make any provision for his wife; and that Court having no power to compel him. The cases upon this subject are collected in Mr. Cox's note to *Bosvil* v. *Brander* (*b*); and the result is, that, where the property is a subject of equitable cognizance, it is not material whether the wife, or the husband, or his representatives or general assignees, come for the aid of the Court. A wife in the situation of this plaintiff, therefore, may come to this Court for the purpose of having that to which she is entitled secured to her and her family, and part settled to her separate use. She is entitled to the same reference as was directed in *Worrall* v. *Marlar*, and *Bushman* v. *Pell* (*c*), for the purpose of receiving a proposal for the settlement. In *Wright* v. *Rutter* (*d*), the Master of the Rolls observes, that it is now determined, that an action will not lie against the executor for property bequeathed to a married woman; and one of the reasons is, that the husband would get it free from the condition a Court of equity imposes. It is not necessary, therefore, that the property should be in this Court, or in the hands of trustees; for, if it was in the Ecclesiastical Court, or in the hands of an executor or an administrator, the interest of the wife is protected. That case related to a residue of personal estate in the hands of an administrator, for which it was not necessary to come here; but that was held not to make any difference. But, suppose the husband could sue at law, this defendant could not make this defence, that he will not pay, but will keep this fund in satisfaction of the husband's debt to him; for it is clear, at law, a creditor of the husband cannot set off the husband's debt against the demand of the husband and wife, and being entitled in her right he must sue with her. Still less should he be permitted to retain in equity

(*a*) *Tanfield* v. *Davenport*, Tothill, 179; *Mealis* v. *Mealis*, Hil. 1764: 5 Ves. 517, note to *Blount* v. *Bestland*.

(*b*) 1 P. Wms. 458.

(*c*) 1 Cox, 153; 1 P. Wms. 459, Mr. Cox's note.

(*d*) 2 Ves. jun. 676.

upon that ground; for, where he is permitted to avail himself of the legal right, the right must be clear. There have been several other cases, in which the Court has acted upon a residue, just as if the property was in the hands of trustees. The accident, that Montolieu is the administrator, cannot alter the right of the wife. In *Atherton* v. *Knowell*, a husband, entitled in right of his wife to an income, being unable to maintain her, the Court referred it to the Master to see what it would be proper to allow her out of that fund; *Sleech* v. *Thorington* (*a*); *Watkyns* v. *Watkyns*, there cited (*b*); *Milner* v. *Colmer* (*c*); *Oglander* v. *Baston* (*d*).

(*a*) 2 Ves. 560.
(*b*) 2 Atk. 96.
(*c*) 2 P. Wms. 639.
(*d*) 1 Vern. 396.

The only ground that can be taken against this bill is, that Lord Elibank became the purchaser of what might in future accrue to Lady Elibank; but there is no stipulation of that sort in the settlement, nor any indication of that intention. On the contrary, all the funds settled are her own, and a very scanty provision is made for her out of his estate. In *Burdon* v. *Blaster*, in 1775, the husband having become a bankrupt, the question arose between the assignees and the wife. The bill was filed by the assignees; and, though an objection was raised on account of the settlement, the wife obtained her equity. In *Pawlet* v. *Delavel* (*e*) it is laid down that though the Court will make a decree, where the husband and wife are parties, where the wife has a proper settlement, to pay to the husband and wife, where the wife has not had a sufficient settlement the Court will not. As to the form of this suit, the wife sues alone, it is true, not with her husband; but that was the case in *Worrall* v. *Marlar*; if she has the equity against her husband, she must be entitled to sue.

(*e*) 2 Ves. 663.

The *Attorney-General*, Mr. *Mansfield*, and Mr. *W. Agar*, for the defendant Montolieu.—The objection to the form of the suit would merely occasion delay; and a bill would be filed in their joint names.

There is no case in which the Court has decreed against a trustee who had paid the husband without suit that the wife had an equity to charge the trustee. The husband

suing in the Ecclesiastical Court, is suing persons unwilling to pay him; and the trustee or executor, so sued, has come into this Court to restrain him. That is quite a different case. Suppose the husband institutes a suit in the Ecclesiastical Court, and the trustee submits to pay, could the wife come here and say, it was in fraud of her equity? Lord *Hardwicke*, in *Jewson* v. *Moulson*, supposes a case, where the husband can come at the property without the aid of the Court. All the instances are, where the person has refused to pay, unless compelled by a Court of equity. That gives the jurisdiction; and none can be produced, where the executor has been prevented from paying to the husband, if he chose to do so; or where, having paid to the husband, he has been charged as upon a breach of duty by reason of that payment, and made to refund. The case of *Worrall* v. *Marlar*, is a singular one, and was influenced by the insolvency of the husband; but this plaintiff has a competent provision.

This case is certainly new, in the circumstances that the husband is debtor to the other defendant; but if he could have paid the husband, and the Court would not have made him refund, there can be no difference from his retaining against the husband. Suppose Lord Elibank had sued, and the equity of the wife, having a very large provision, was out of the question, this Court would never compel the administrator to pay that share to his debtor, unless the latter would allow the debt. This Court goes infinitely beyond Courts of law, as to set-off. It would be strange to permit the wife to intervene against the administrator retaining, where she could not intervene to prevent his paying her husband, and the husband paying his debt out of that. *Burdon* v. *Blaster*, *Jewson* v. *Moulson*, and all the other cases, go upon the same ground; that the property was in the Court, and the husband, or his assignees, could not have it without the assistance of the Court. In this case the plaintiff comes to get it from the administrator, contrary to the plainest equity between him and her husband. There is no instance of a bill, by the wife against her husband, to have

the property settled to her separate use; which is the object of this bill. This property, though subject to the equity of the wife, is the property of the husband: *Packer* v. *Wyndham* (*a*).

(*a*) Prec. Ch. 412.

The *Solicitor-General*, in reply.—*Packer* v. *Wyndham* has nothing to do with this case. The wife being dead, and without issue, the question arose between the assignees of Mr. Packer, and the next of kin of Mrs. Packer; and it was insisted that, if the agreement had been carried into execution, Mr. Packer would have been entitled to the money: and she having been provided for during her life, and being dead, and not having left any children, the purpose for which the Court laid its hand upon the property, to secure a settlement, was at an end. The rule is clearly laid down in *March* v. *Head* (*b*), and it is now a settled rule, that if a husband, in right of his wife, becomes entitled to any sum exceeding 200*l.*, this Court will not permit him to have it without a reference to the Master, for the purpose of a settlement, unless the wife consents that it shall be paid to her husband. The rule is clear, that, wherever the husband becomes entitled to sue in right of his wife, she must consent that he shall have it, or he is under the necessity of making a settlement, unless the Master is of opinion that the settlement already made by the husband is such as to answer all the purposes of the wife. *Packer* v. *Wyndham* is mentioned by Lord *Hardwicke* in *Bates* v. *Dandy* (*c*), as consisting of many particular circumstances. *Worrall* v. *Marlar* has determined, that the wife may file the bill by her next friend; and there can be no doubt, that this plaintiff has an interest that will enable her to file such a bill for the purpose of having her property ascertained. Lord Elibank is passive. It is true, if he had assigned this to Montolieu, that might have bound the plaintiff; but he has not done so. This administrator stands in the character of trustee, and has no right to object, merely for his own advantage. If this bill should be dismissed the defendant would not be discharged, but on the death of Lord Elibank the right would survive, and she might file

(*b*) 3 Atk. 720.

(*c*) 2 Atk. 207. See statement of *Bates* v. *Dandy*, from Reg. Lib. 1 Russ. 33, n., and a note of Lord *Hardwicke's* judgment, 3 Russ. 72, n.

a new bill. It is not like a release. If a proper settlement has not been made, there must be a proposal laid before the Court, as in *Worrall* v. *Marlar*. That must be made by the husband, not by Montolieu, who has no more right than any other creditor.

(*a*) Afterwards Earl of Rosslyn.

LORD CHANCELLOR LOUGHBOROUGH (*a*).—I wish to consider this case.

Feb. 19th, 1801.

LORD CHANCELLOR LOUGHBOROUGH.—The only difficulty I had in this cause was upon the form of the suit: whether a married woman, by her next friend, could be the plaintiff in this Court.

With respect to the point made by the answer of Montolieu, that he had a right to retain against the debt of the husband, being possessed of the fund as administrator, and the wife being one of the next of kin, I am very clearly of opinion the defendant had no right to retain (*b*). The administrator is trustee for the next of kin: the plaintiff being one of them, if she has any equity against her husband with regard to this money, that equity will clearly bar any right of retainer he can set up to the property, of which he became administrator.

(*b*) See also *Carr* v. *Taylor*, 10 Ves. 574; *Ex parte Blagden*, 2 Rose, 294; *Ex parte O'Ferrall*, 1 G. & J. 347.

With respect to the only difficulty I had upon the point of form, if she is entitled, and there is no way of asserting her right against her husband, except by a bill, that objection, I think, does not weigh much. If the defendant Montolieu had done what would have been the natural thing and the right thing, and what he certainly would have done but for his own interest, he would have been the plaintiff, desiring the Court to dispose of the fund, and for her benefit, to protect her interest in it. Then, upon all the circumstances, it is very clear, if it had come before the Court, it would have been matter of course to have pronounced upon her equity upon the bill of the administrator, praying that the money in his hands might be properly disposed of; and I would not have suffered this money to be paid to Lord Elibank, without making a provision for her, for the provision upon her marriage

was clearly not adequate to her fortune; and it is clear that provision was made upon the expectation, that, by circumstances to occur in his family, there would be an opportunity to do better for her at a future period. The difficulty was, that it was very unusual in point of form—the bill coming on the part of the wife, instead of the husband.

Declare, that the defendant Montolieu is not entitled to retain, in satisfaction of the debt due from the defendant Lord Elibank to him, but that the distributive share of Lady Cranstown's fortune, accruing to the plaintiff, as one of her next of kin, is subject to a farther provision in favour of the plaintiff and her children, the settlement made upon her marriage being inadequate to the fortune she then possessed. Refer it to the Master to take the accounts, and to see a proper settlement made upon the plaintiff and her children, regard being had to the extent of her fortune and the settlement already made upon her.

MURRAY *v.* LORD ELIBANK.

June 6th. July 30th, 31st, 1804.

[REPORTED 10 VES. 84.]

Right of children to a provision out of the property of their mother, under a decree directing a settlement by the husband on her and her children, notwithstanding her death before the report.

Demurrer to the bill of the children was overruled.

THE bill was filed by the infant children of Lord Elibank, stating the proceedings in the cause *Lady Elibank* v. *Montolieu*, and the decree, directing the Master to approve a proper settlement to be made by the defendant Lord Elibank on the plaintiff, Lady Elibank his wife, and her children by him, regard being had to the extent

of her fortune and the settlement already made upon her by Lord Elibank.

The bill farther stated, that before any report Lady Elibank died intestate; and prayed that it may be declared, that the plaintiffs and the defendant Alexander Murray, another child of Lord and Lady Elibank, have, under the decree of the 19th February, 1801, a right to have a provision made for them out of the said one-fourth of the personal estate of Lady Cranstown: and that it may be referred to the Master to approve of a proper settlement to be made by the defendant Lord Elibank upon the plaintiffs and the defendant Alexander Murray, being all the children; regard being had to the extent of the fortune of Lady Elibank, and the settlement already made by Lord Elibank.

To this bill the defendant Montolieu put in a demurrer

Mr. *Alexander* and Mr. *Cooke*, in support of the bill.—The question is, whether the children are entitled to sustain a supplemental suit, so as to have the benefit of the decree. This right is purely a creature of the Courts of equity of this country. Upon principle, why should the interest, given by the decree to particular persons, beyond the interest of the parent, depend upon the accident of death? But the interest of the children rests most safely on the uniform practice. In *Rowe* v. *Jackson* (*a*), it was said by Mr. *Madocks*, and assented to by the Court, that, where a husband sues for his wife's fortune, and is decreed to make a proposal for a settlement, and the wife dies, the husband shall be compelled to carry it into execution for the children; and he cited a manuscript case for that, and observed, that the same thing was said by Lord *Thurlow*, in 1779, upon a motion by Mr. *Mansfield*; but it is otherwise if the wife dies before the decree. It is now decided, that the creditors of the husband are exactly in the same situation. An order was made by Lord *Alvanley*, enforcing the equity for the children, after the death of the wife, even against the assignment of the husband. It does not appear whether the husband had

(*a*) 2 Dick, 604, stated also from a manuscript note of Mr. Romilly.

carried in a proposal before the death of the wife, or before the assignment; but that cannot make a difference, as the mere proposal could not bind more than the decree, in obedience to which it is made. The rule is now clearly settled, that the children have, through their mother, an interest in her fortune. The uniform language of the Court is, that the husband shall go before the Master, and lay proposals for a settlement upon the wife and children. It appears, from *Hearle* v. *Greenbank* (*a*), that Lord *Hardwicke* so considers it, and seems to think that a decree might be made after the death of the wife, the children, even after her death, having a right against the father for a provision. But here is a decree, establishing this right of the children in the life of the wife, and the settlement is to be considered as made at the date of the decree, and in the nature of an agreement sanctioned by the Court, giving the husband the fortune upon terms. In *Martin* v. *Mitchell*, the case before Lord *Thurlow* in 1779, the Court, after the death of the wife before a settlement, carried the proposal into execution against an assignment to a creditor.

(*a*) 3 Atk. 695. See Ib. p. 717.

Mr. *Richards* and Mr. *W. Agar*, in support of the demurrer.—In the case, either of a sum of money, the property of a married woman, which belongs to her husband in her right, or a bond or note, a chose in action, or what Lord *Alvanley* called a chose in equity, which the husband may recover, but, if he does not, will survive, the debtor may pay the husband who may release him. It is his property, subject to the contingency of survivorship. A Court of equity will not assist him, unless he will make a settlement; but, if the wife does not desire a settlement, the Court will not make one for her; and it has been held, that the Court cannot refuse to the wife the power of giving the property to her husband. It is the property of the husband, to be extended to the wife and children, if she thinks fit; but the Court would not, upon her desire in court, permit her to give it to any one else, as she might, if it was hers, independent of the equity the Court attaches upon it. Having not the property, but an

equity only, she has no interest to give up. There is no analogy, therefore, to the case of a fine, in which an interest does pass. The trustee is justified in paying the husband; but, if the wife had an interest in it, he would be answerable for that to her.

But, supposing the wife to have some interest, can the children have any? If she is dead, they cannot come here for a settlement: *Scriven* v. *Tapley* (*a*). It is said, the Court has, by the decree, given them an interest. They were not parties before the Court at the time that decree was made. They have no more interest in the property than a stranger; but are considered by the Court in a manner comprehended in the mother, while she exists, who is therefore allowed to extend her plan of provision to them, but not as distinct and separate objects, having an interest independent of her. Suppose Lady Elibank had waived the order for a settlement, and desired the money to be paid to her husband, the Court, considering the equity hers, would have held, that she might disappoint her children. The proposal, not completed and carried into execution by the Court, is only an offer; and, if the wife dies before it is carried into execution, the husband is remitted to his legal right. In all these cases everything is given with reference to the wife —nothing independent of her. Only two authorities are produced for making any order for the benefit of the issue of the marriage after the death of the wife; the one, *Rowe* v. *Jackson*, a very short note; the other, an order, made by Lord *Alvanley*, upon petition, by some slip in the absence of the assignees, who were not parties, and without even inquiring whether they had any objection to it. The property was very small, which perhaps might have had some influence. The Court cannot say what proportion the wife would have settled upon herself, and what upon her children. In *Macaulay* v. *Philips* (*b*), it was held, that the decree gave no interest to the husband, but it survived to the wife; and Lord *Alvanley* says, if she died, notwithstanding his proposal, he would have been entitled. That opinion was given by Lord *Alvanley*

(*a*) Amb. 509. 2 Eden, 337.

(*b*) 4 Ves. 15.

with great deliberation, and takes the distinction between a settlement approved by the Court and a mere proposal.

LORD CHANCELLOR ELDON.—There are two points upon this demurrer: one of form, the other upon the merits. If the wife has this equity for a provision for herself and her children up to the moment of the completion, it is competent to her to give it to her husband. A great variety of proceedings have occurred, in which the Master has stated, that, with reference to the point of settlement, the party had waived it; and I apprehend, it will be found that she may, between the period of the order and her death, waive the benefit of that order (*a*). The question then is, if between the date of the order and her death, she does not, by some authoritative proceeding, express an alteration of her mind, whether that order is to stand for the benefit of the children. The two decisions that have been mentioned are strong authorities for that. Let an enquiry be made into the circumstances of those cases; and, as to the latter, whether the assignees of the husband were heard or not.

Feme covert may waive her equity for a settlement out of her own property, even after the order, at any time before its completion.

(*a*) See *Lloyd* v. *Williams*, 1 Madd. 466.

July 30th, 1804.

Mr. *Alexander*, for the plaintiffs, stated the case of *Martin* v. *Mitchell*, from the Register's book, in which the motion before Lord *Thurlow*, in 1779, was made. In 1777, a decree was made for an account, and that what should be found due to Hannah Fearns should be paid into Court, to her separate account, with the usual direction for a settlement. The sum of 3000*l.* was, by the report, stated to be due, and was carried over. After her death, in 1779, the motion, referred to in *Rowe* v. *Jackson*, to pay that sum to the husband, was made, and refused; and an order was made, directing the husband to go before the Master, and execute the order for a proposal. That proposal was carried into effect, by petition, at the Rolls; and, under another order, in 1803, stating all the proceedings, the children were paid.

It appears from these cases, that the equity of the wife

does survive to the children; and their only mode of availing themselves of this interest is by supplemental bill. The case of *Macaulay* v. *Philips* is not applicable. The dictum of Lord *Alvanley* would have been inaccurate, if there had been any children; but there were no children. It amounts to no more than that the proposal did not sever the joint-tenancy between the husband and wife. If, as your Lordship has observed, the wife can waive her right under the order for the benefit of her children and herself, that cannot affect a case where she has not waived, and is dead.

Lord Chancellor Eldon.—The question is, what is the effect of such an order, as constituting a right in the issue to a provision, if the wife dies without any act done after the date of that order. If this case had been antecedent to the period when the manuscript case to which Mr. *Madocks* alluded was decided, it would have been very difficult, consistently with what the Court does with the wife's property, to say there was such a right as is now asserted, upon a proceeding that went no farther than an order to lay a proposal before the Master. The husband, where he can, is entitled to lay hold of his wife's property, and this Court will not interfere. Previously to a bill, a trustee, who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband. Lord *Alvanley*, in *Macaulay* v. *Philips*, has laid down, that, after a bill filed, the trustee cannot exercise his discretion upon that; that the bill makes the Court the trustee, and takes away his right of dealing with the property, as he had it previously. I have heard that otherwise stated in this Court, at the bar, at least. But that case is the last; and, I think, contains very wholesome doctrine upon that point. I should have supposed, a decree made in the cause proceeded upon the right or equity in the wife at the filing of the bill; for decrees are only declarations of the Court upon the rights of the parties when they begin to sue. The wife is entitled to call for a declaration, that she

Husband, where he can, may lay hold of wife's property; and this Court will not interfere.

Previously to a bill, a trustee for a feme covert may pay her personal property, or the rents and profits of her real estate, to her husband; not after a bill filed.

then had a right to a provision for herself and her children; and yet it is clear, after such a bill filed, she might come into Court and consent to her husband's having the fund entirely under his dominion. If she does not, the Court, by the decree, orders a proposal to be made for a settlement upon the wife and issue.

It has been truly observed, that this doctrine is a mere creature of the Court, founded altogether in its practice. The case of *Macaulay* v. *Philips*, proves, what I should have had no doubt upon, that notwithstanding that order for a proposal, if either party died while it rested merely in proposal, that would not affect the right by survivorship as between the husband and wife. There were no children in that case, certainly. It is not unfrequent, where the Master makes his report after a decree, for him to state, that the parties had declined to lay a proposal for a settlement before him. That has occurred since I have sat here; but, when at the bar, I was frequently concerned in this final arrangement, that, notwithstanding such order by the original decree, upon further directions the wife came, consenting that the fund should be taken out of Court, and was permitted to do so. If, therefore, the issue have a right against the father, it is dependent altogether upon the will of the mother. There is, perhaps, some difficulty in making all the principles of the Court upon this subject consistent with the notion of such right in the children; but it is not for me to reconcile all these principles, if there is practice sufficient to establish a given course as to that. In *Rowe* v. *Jackson* (and I can, from my own memory, confirm both accounts of that case), upon an application, where it was necessary to consider whether, the wife never having expressed any change of opinion between the period of the order for a proposal and her death, that order gave the children any right, Mr. *Madocks* stated, that it was not according to the practice, after that order, to permit the husband to avail himself of the death of the wife to take the fund, leaving the children unprovided. His authority, always considerable, is in that instance peculiarly to be regarded,

Notwithstanding an order for a proposal for a settlement, under the equity of a married woman, by the death of either, while resting in proposal, the right by survivorship, as between the husband and wife, is not affected.

as he referred to another case, in which Lord *Thurlow* was satisfied that such was the rule, and acted upon it. But it does not rest there; for in a subsequent case it is clear from the Register's Books that Mr. *Mansfield*, after the death of the wife, moved that a sum of money should be paid to the husband; and Lord *Thurlow* refused that application, upon the ground that the order for a proposal on behalf of the children was an obstacle. That was followed by what Lord *Alvanley* did upon a petition; whether regularly or not, will not shake the doctrine, considering what had been done before. In that instance, Lord *Alvanley* would not deliver out that small sum, little more than 300*l.*, until satisfied that there was some provision for the children.

Taking all this together, however numerous the difficulties upon it, it is too much for me to say, upon the argument of a demurrer, all that has been done in the cases referred to is to go for nothing, because it is difficult to say, ab ante, it should be done, and that I am to set up a different course of practice. I agree also with Mr. *Alexander* as to the dictum of Lord *Alvanley* in *Macaulay* v. *Philips*, which construction is necessary to make him consistent; and attention being given to the circumstance that there were no children, there is no inconsistency in that case. The principle must be, that the wife obtained a judgment for the children, liable to be waived, if she thought proper; otherwise, to be left standing for their benefit at her death.

Next, as the form: if the children have acquired a right by the judgment in the former suit, it is subsequent to the institution of the proceeding in that suit; and unless they can apply by petition, under the liberty to apply, I do not see how they can, except by supplemental bill.

The demurrer, therefore, ought to be overruled. If, upon the hearing of the cause, this should turn out to be wrong, it is infinitely better that it should go to the House of Lords upon a full hearing.

Demurrer overruled.

MURRAY *v.* LORD ELIBANK.

May 21*st*, 22*nd*. *July* 21*st*, 1806.

[REPORTED 13 VES. 1.]

Right of children to a provision out of the property of their mother, under a decree directing a settlement on her and her children; notwithstanding her death before the report, no act being done by her to waive the equity.

IN this cause, the demurrer of the defendant Montolieu having been overruled, answers were put in, and the cause came on to be heard.

Mr. *Alexander* and Mr. *Cooke*, for the plaintiffs, relied upon the opinion expressed by the *Lord Chancellor* upon the demurrer.

Mr. *Richards* and Mr. *W. Agar*, for the defendant Montolieu.—This is a very important and a new question, which the *Lord Chancellor* did not profess to decide upon the demurrer. The opinions that have been expressed shew the notion that has prevailed as to the practice, but there is no decision upon it. The order by Lord *Alvanley* would not have been made if the Court had been aware that the creditors were not parties, the husband and wife having assigned the fund, to secure a debt; and it was delivered out of Court upon the statement that it was very small, the creditors not being parties, and no contest. The cases of *Martin* v. *Mitchell* and *Rowe* v. *Jackson* were also upon petition, and no contest. It is true, this equity is the creature of this Court; it has been held, both here and by Lord *Eldon*, that it has no analogy to a fine, and it does not arise if the husband gets the property, if it is

not intercepted in the way; but if the order of the Court is necessary, either upon the bill of the wife, which must now be admitted, or of the husband, the Court will make him do what is just; otherwise, there is no jurisdiction against him, and he cannot be held guilty of a contempt. He may run his life against hers. The Court goes no further than refusing to assist him, unless he will make a provision. The Court does not act upon the interest of the wife; for if so, they would give it to her. The Court has no dominion upon the subject, but exercises a sort of arbitrary authority, there being no interest in her in point of law. The Court cannot compel him to give her an interest, but merely refuses to interfere in his favour, except upon certain terms. There is no doubt that, after a reference directed, as to a provision for the wife and children, she may come the next day, and, by her own act of consent, defeat that provision for her children, though without her consent the Court would not give the fund to her husband; but there is no jurisdiction to prevent her giving it to him. Mr. Justice *Buller* attempted it, and refused to take the consent; but Lord *Thurlow* held, that he could not refuse it, and, with great reluctance, gave the money to the husband. The power which the wife has in that way to defeat the reference in favour of the children, shows clearly that the reference is directed upon her account, not theirs.

(*a*) 2 Ves. jun. 192, cited.

In the case of *Alexander* v. *M'Culloch* (*a*), it was never thought possible to give the property to the wife; but each came, from time to time, to get a little; and Lord *Thurlow* fed the husband occasionally, in order to induce him to make a proposal. But she might have come to give it away to him; and, in fact, they did at last agree, as they did also in *Macaulay* v. *Philips* (*b*). The protection subsists only as long as the wife chooses. When she is gone, the equity, which is attached to her, and to her only, must be gone also. What interest can the children have against their father? Are they purchasers as against him? He is a purchaser of his wife's choses in action by the act of marriage, completed by the administration.

(*b*) 4 Ves. 15.

What right have the children, as against their father, to insist upon a part of the fortune?

In *Scriven* v. *Tapley* (*a*), the *Lord Chancellor* held this equity personal to the wife, reversing a decree at the Rolls in favour of the children. *Bond* v. *Simmons* (*b*), also, is an authority that the wife surviving is entitled to the whole; and the consequence is, that by her death the equity is gone, and the children cannot file a bill to bring the money into court. These authorities outweigh the loose dicta upon the petition, and without contest, in favour of this bill; and it stands upon no foundation of principle.

(*a*) Amb. 509; *S. C.*, 2 Eden, 337.

(*b*) 3 Atk. 20.

Mr. *Alexander* in reply.—The opinion of Lord *Eldon* is expressed in favour of this bill. It is supposed that the plaintiffs must contend, that this equity would bind the wife herself, if she chose to relinquish it. But, admitting that, notwithstanding an order for a settlement, if the husband dies, the wife surviving is not bound to make a settlement, can it be said, therefore, the husband is not bound? There is no doubt, the equity is that of the wife; and she may, in any stage, come into court, and relinquish the equity both for herself and her children.

[*Master of the Rolls* (Sir *W. Grant*).—Down to what time?]

To the time at which the settlement is actually made. It is an equity, in opposition to the husband's legal right, upon which it is imposed as a burthen in favour of herself and those in whose favour she may think fit to apply; and which she may at any period abandon. There is nothing inconsistent in her right to relinquish that claim, which she has on behalf of herself and her children. But after her death the Court will suppose she died with the intention to insist upon it for her children; in whose behalf it shall subsist after her death, unless expressly waived during her life. After the order made upon her application, and not waived, which by the event of her death is now become impossible, the right of the children is vested; the effect of the order being a specific lien upon the particular fund, in respect of which the husband makes the

application, notwithstanding the general terms of the order.

The Master of the Rolls (Sir *W. Grant*).—This case arises out of the case of *Lady Elibank* v. *Montolieu;* by the result of which the right of Lady Elibank to maintain a suit for a settlement against her husband and the administrator was established; and it was determined, that the claim which the administrator had, as a creditor of her husband, did not stand in the way of her right.

The question now, Lady Elibank having died before anything was done under the decree, by which the Master was directed to approve a settlement upon her and the children, is, whether the children have a right to the benefit of that decree?

It is contended, on the part of the defendant Montolieu, that the right to demand a settlement is a personal equity, attaching to a married woman, and in no sense the right of the children; for, if it were, the mother could not relinquish it, as it is admitted she may; that, though the children may derive a consequential benefit from having the settlement made upon the mother extended to them, yet, when her right is out of the question, as it is in this instance by her death, there must likewise be an end of theirs. Upon the other side it was contended, that, when a settlement was, by the decree, directed to be made upon the mother and the children, the right of the children is so far fixed, that the Court will recognise and carry it into effect, notwithstanding her death, provided no act was done by her to waive the benefit of it. It seems to be assumed in the argument, both here and before Lord *Eldon*, that it was competent to the mother to waive the settlement at any time before it was actually completed; that is, even after a proposal given in by the husband. Lord *Hardwicke*, however, determined the contrary (*a*); stating, that though the wife might give up her interest in the money, if she pleased, yet nobody could consent for the children, which may be. That does not directly apply

(*a*) *Anon.*, 2 Ves. 671. See, however, *Lloyd* v. *Williams*, 1 Madd. 466, in which the opinion of Lord

to this case; as, I believe, no proposal was laid before the Master in this case.

Eldon is recognised and approved of.

With regard to this equitable right which a married woman has in this Court to a provision out of her own fortune, before her husband reduces it into possession, it stands upon the peculiar doctrine of this Court. It is vain to attempt, by general reasoning, to ascertain the extent of that doctrine. We must look to the practice of the Court itself. It is sufficient to say, the habit of the Court has always been of itself, and without any application previously made by the married woman, to direct an inquiry, when money has been carried over to her account, whether any settlement has been made; for the money is carried over subject to that inquiry, and the constant habit has been to direct a settlement not upon the wife only, but upon the children also. I am not aware that she has in any case been permitted to say she claims a settlement for herself, but not for her children. She has the option not to have any settlement made; but if a settlement is to be made, it is always directed for the benefit of the wife and the children. When she comes to give up her right to her husband, she is examined whether she wishes for any settlement. If she does not desire any settlement, then the money is paid to her husband. If she desires a settlement, the settlement is upon her and the children.

The equitable right of a married woman stands upon the peculiar doctrine of the Court. When money is carried over to her account, the habit of the Court is, without any previous application by her, to direct an inquiry, whether any settlement has been made: and the constant habit has been to direct a settlement, not upon her only, but upon the children also: her option to waive a settlement not enabling her to have it confined to herself, excluding her children.

The question has been made, whether the children have any substantive and independent right to claim a settlement after the death of their mother, if a settlement was not directed during her life? In the case of *Hearle* v. *Greenbank* (*a*), Lord *Hardwicke* appears to state that as a doubtful point; and that he conceived there was no case determining that the children have such right. His Lordship seems not to have recollected the case that was before him, *Grosvenor* v. *Lane* (*b*), in which he took notice of such a decree, though the question before him was not upon the point. That was the case of the second husband, endeavouring to reduce his wife's fortune into possession; and the Court directed a settlement upon the child, the immediate point in the cause before Lord

(*a*) 3 Atk. 695. See Ib. page 717.

(*b*) 2 Atk. 180.

Hardwicke turning upon the right of the child absolutely to the whole legacy, in consequence of an appropriation of it by the second husband.

(*a*) Amb. 509; 2 Eden, 337.

In a subsequent case, *Scriven* v. *Tapley* (*a*), Sir *Thomas Clarke*, as a matter of course, taking it as the ordinary equity, directed a proposal by the representative for a settlement upon the child, the wife being dead. That part of the decree, it is true, was reversed by Lord *Northington:* but the opinion, that children have that equity in their own right, and independent of any claim through the mother, prevailed so much, that, notwithstanding that reversal, in a year and a half afterwards, Sir *Thomas Sewell*, in *Cockel* v. *Phips* (*b*), made precisely the same decree. Everyone knows how intimately Sir *Thomas Sewell* was acquainted with the practice of the Court.

(*b*) 1 Dick. 391. See, however, *Lloyd* v. *Williams*, 1 Madd. 464, where it appears that the point said to have been decided by Lord *Northington* in *Scriven* v. *Tapley*, did not arise.

There is, therefore, a great deal of authority in opposition to that decision by Lord *Northington*, in *Scriven* v. *Tapley*, all weighing strongly in favour of the right of the children claiming under a decree in favour of their mother; for, if their right to come with an original demand for a settlement upon them, their mother having died without demanding any settlement, is established, à fortiori, if she has claimed, and the Court has directed a settlement, the children must be entitled. As to that there are very few cases, but all are one way. The doctrine, as far as there is any memorial of it, is uniform; and it is upon the uniform habitual doctrine of the Court that you are least likely to find cases; and in the cases that have occurred, the Court has interposed, not upon any controversy between the parties, but upon its own doctrine. In *Martin* v. *Mitchell*, the husband claimed the fund, and the Court would not permit him to take it, but directed the former order, for a settlement upon the wife, to be prosecuted. In *Rowe* v. *Jackson* a similar application appears to have produced a similar refusal; and both these cases were before Lord *Thurlow*. No ground is laid upon which I should be induced to depart from the established doctrine. We can look nowhere but to the practice of the Court for the extent of that doctrine. Here we find it.

There is no instance in which the husband has succeeded in getting money out of court without making a provision for the children.

These plaintiffs, therefore, are clearly entitled upon their supplemental bill. It is not necessary to determine, whether they could have got at it by any other mode.

By common law, (unaffected by recent legislation,) on marriage, the husband became entitled to receive the rents of the wife's real estates during their joint lives, and he became absolutely entitled to all her chattels personal in possession and to her choses in action, as debts by obligation, contract, or otherwise, if he reduced them into possession; or if he did not, as administrator of his wife, if he survived her; and he became also entitled to her chattels real, with full power to alien them, though if he died before his wife, without having reduced into possession her choses in action, or without having aliened her chattels real, they would survive to the wife. See Gilb. Ten. 108; Co. Litt. 67 a., 300 a., 351 b., 351; 1 Roll. Ab. 342, pl. 1; Co. Litt. 185 b.; *Fleet* v. *Perrins*, 3 L. R. Q. B. 536, 4 L. R. Q. B. 500.

The husband acquired this interest in the property of his wife in consideration of the obligation which, upon marriage, he contracted, of maintaining her and his children by her; but the common law was defective, inasmuch as it possessed no means of ensuring the performance of the duty imposed upon the husband, since in many cases he might have it in his power to alien all the property to which he was entitled jure mariti, or upon his becoming bankrupt or insolvent it would vest in his assignees for the benefit of his creditors, and thus his wife, however great may have been her fortune, might, with her children, be left utterly destitute. Courts of equity have, from a very early period, endeavoured to remedy this deficiency in the common law, by giving to the wife, in certain cases, a right to a provision out of her own property; this right is called her equity to a settlement. See the observations of Lord *Hardwicke* in *Jewson* v. *Moulson*, 2 Atk. 417; and of Lord *Cottenham* in *Sturgis* v. *Champneys*, 5 My. & Cr. 101, 105.

The jurisdiction to compel the husband, or those claiming under him, to make a settlement upon the wife, was first assumed in cases where it was necessary for them to apply to the Court for assistance in order to obtain possession of the property of the wife; which assistance the Court, acting upon the maxim, *that he who seeks equity must do equity*,

withheld until an adequate settlement was made upon the wife: *Bosvil* v. *Brander*, 1 P. Wms. 459. In consequence of this origin of the jurisdiction, it was thought, that the equity of a wife to a settlement was confined to those cases in which the husband, or those claiming under him, were plaintiffs. See *Bosvil* v. *Brander*, 1 P. Wms. 460. However, since the decision of *Lady Elibank* v. *Montolieu*, the wife has been permitted actively to assert her equity as a plaintiff: *Sturgis* v. *Champneys*, 5 My. & Cr. 105; *Eedes* v. *Eedes*, 11 Sim. 569; *Hanson* v. *Keating*, 4 Hare, 6; *Osborn* v. *Morgan*, 9 Hare, 434; and see *Newenham* v. *Pemberton*, 1 De G. & Sm. 644, in which case the Court refused to take a bill off the file, although it was filed by the infant plaintiff in her maiden name by her next friend, whereas she was in fact clandestinely married, and the Court directed a settlement, although the bill did not expressly pray to that effect. See, however, the remarks on this case *In re Potter*, 7 L. R. Eq. 487.

A trustee is always justified in refusing to pay over the wife's fund to the husband even at her request, and insisting on affording her an opportunity of asserting her equity to a settlement, and where a trustee has paid into Court a fund to which a married woman is absolutely entitled, he is entitled as of course to his costs between solicitor and client, unless his conduct has been simply capricious or vexatious. *Re Swan*, 2 Hem. & Mill. 34; sed vide contra, *Penfold* v. *Bouch*, 4 Hare, 271; in that case, however, when the demand was made upon the trustee, there had been already what the Court considered a sufficient settlement made by the husband on the wife, so that her equity to a settlement was clearly exhausted: 2 Hem. & Mill. 38.

Where a trustee has reason to believe that the husband and wife have agreed to settle a sum of money in his hands, and especially if the wife does not distinctly express a wish that payment is to be made to her husband, he would be justified in paying the money into Court. *In re Bendyshe*, 3 Jur. N. S. 727.

The necessity for a married woman to assert her equity to a settlement has been much diminished by the Married Woman's Property Act, 1870, 33 & 34 Vict. c. 93 (more fully treated of in the next note), according to which the earnings of a married woman, after the passing of the Act (sect. 1), personal property coming to her under an intestacy, or any sum of money not exceeding 200*l.* under a deed or will (subject to the trusts of any settlement affecting the same) (sect. 7), and the rents and profits of freehold, copyhold, or customary hold property descending upon any woman married after the passing of this Act

(sect. 8), will belong to her to her separate use. Deposits and investments also may be made (sects. 2, 3, 4, & 5) and sums assured (sect. 10) to a married woman's separate use.

The Court of Bankruptcy has, it seems, jurisdiction to order a settlement to be made upon the wife of a bankrupt, insisting upon her equity to a settlement: *Ex parte Thompson*, 1 Deac. 90; *Ex parte Norton*, 8 De G. Mac. & G. 258; *Ex parte Coysegame*, 1 Atk. 192.

As against whom the equity of a wife to a settlement is binding.]—The equity of a wife to a settlement is binding not only upon her husband, but also upon his assignees in bankruptcy, under the Insolvent Debtors' Act, or under a general assignment for the payment of his debts: *Jewson* v. *Moulson*, 2 Atk. 420; *Burden* v. *Dean*, 2 Ves. jun. 607; *Pryor* v. *Hill*, 4 Bro. C. C. 138, and notes by Belt; *Oswell* v. *Probert*, 2 Ves. jun. 680; *Sturgis* v. *Champneys*, 5 My. & Cr. 97.

It was, however, at one time doubted whether it was binding upon the assignee of the husband for valuable consideration; but Lord *Alvanley*, in the case of *Macaulay* v. *Philips*, 4 Ves. 19, after fully considering the authorities, stated his opinion to be in favour of the claims of the wife. "Many cases," said his Lordship, "upon this point have been before me, which have put me under the necessity of considering very much the rights of the wife, and I am clearly of opinion the doubt respecting the assignment of the husband for a valuable consideration of the wife's equitable interest, was not well founded (with the single exception, perhaps, of a trust of a term of years of land), upon which, perhaps, there may be some doubt; but subject to that, I am clearly of opinion that an assignment for a valuable consideration will not bar the equity of the wife, and it would be strange if it did, since by the determinations in the courts of law, with regard to an action brought against executors by the husband for a legacy due to his wife, it is determined that an action does not lie; and the reason given is, that it would totally defeat the wife's equity. It would be whimsical, then, that the assignment by the husband for valuable consideration should put the assignee in equity in a better situation than the husband himself is in at law. The guard of this Court upon the wife's interest would be very singular if the husband, not being entitled at law, might assign it for a valuable consideration to another person, who would be entitled in equity. I am clearly of opinion it was only a doubt, and it never was decided, that the husband could, by such assignment, or any other means, deprive her of her equity." See

also *Scott* v. *Spashett*, 3 Mac. & G. 599; *Marshall* v. *Gibbins*, 4 Ir. Ch. Rep. 276.

It will be seen hereafter that the doubt thrown out by Lord *Alvanley*, as to whether a wife is entitled to a settlement out of her trust term, is unfounded; the assignee, however, for value of the husband has in other cases (which will be noticed hereafter), been considered to stand in a more favourable position than either the husband or his general assignees.

Although an executor or administrator has a right to set off a debt due to the estate from a husband, against any legacy or share under the intestacy to which his wife is entitled (*Hall* v. *Hill*, 1 Dru. & War. 109), the wife's equity to a settlement is paramount to the right of set off, which cannot be enforced to the prejudice of the wife's equity (if any) to a settlement. If, for instance, the wife is entitled to have the whole fund settled upon her, then the right to set off or retainer will be completely barred; if she has only a right to have part of the fund settled, the right of retainer or set off will be to that extent barred. See *Carr* v. *Taylor*, 10 Ves. 574; *Ex parte Blagden*, 2 Rose, 294; *Ex parte O'Ferrall*, 1 G. & J. 347; *M'Mahon* v. *Burchell*, 3 Hare, 97, 5 Hare, 325; *Reeve* v. *Rocher*, 1 De G. & Sm. 626; *Lee* v. *Egremont*, 5 De G. & Sm. 348; *M'Cormick* v. *Garnett*, 2 Sm. & Giff. 37. *In re Cordwell's Estate*, 20 L. R. Eq. 644. It is presumed that Lord *Loughborough*, when he observed in the principal case (p. 470, ante), "That if the plaintiff had any equity against her husband with regard to the money, that equity would clearly bar any right of retainer that the administrator could set up," merely meant, that the bar to the right of retainer was co-extensive with the wife's equity.

Out of what property the wife can claim her equity to a settlement.] —Where the property of the wife is equitable, and consequently not recoverable at law, it is clear that the husband or his assignees, will only obtain it upon the terms of making a settlement upon the wife and her children, if she require one to be made: *Milner* v. *Colmer*, 2 P. Wms. 639; and a legacy is not deprived of its equitable character by being charged on land, with power of entry and receipt of the rents and profits: *Duncombe* v. *Greenacre*, 28 Beav. 472, 2 De G. F. & Jo. 509.

And where an equitable estate in fee descended on a married woman, the Court, by virtue of her equity to a settlement, has settled the estate on her during her life, but has refused to interfere with the possible estate by curtesy of the husband: *Smith* v. *Matthews*, 3 De G. F. & Jo. 139.

And even where the property, though in its nature legal, becomes, from collateral circum-

stances, the subject of a suit in equity, it appears that the wife's equity to a settlement will attach. This is clearly laid down in the important case of *Sturgis* v. *Champneys*, 5 My. & Cr. 97, where Lord *Cottenham*, in a most elaborate judgment, considers all the authorities upon the subject. In that case the *provisional assignee* of Sir Thomas Champneys, an insolvent debtor, whose wife, Lady Champneys, was entitled *for her life* to real property, of which the legal estate was outstanding in mortgagees, was obliged to file a bill to make his title (subject to the incumbrances) effectual. Upon Lady Champneys claiming her equity to a settlement, it was contended that her life-interest in the estates could not be considered as an equitable interest merely on the ground that the legal estate was outstanding, and that the Court had never made a provision for a wife out of such an interest as the husband in that case had, and that it was not established that the wife's equity extended to the rents of real estate. Lord *Cottenham*, however, reversing the decision of Sir *L. Shadwell*, V. C. (4 Sim. 82), held the wife entitled to a settlement out of the rents of her life-estate. "If," said his Lordship, "the authorities support Lady Champneys' equity as a condition which this Court imposes as the price of the assistance which the assignee asks of this Court, the nature of the estate of the wife in the subject-matter in contest does not seem to be important.

"Upon a careful examination of the authorities, I do not find the time at which the Court did not exercise this jurisdiction in favour of the wife. In *Boscil* v. *Brander*, 1 P. Wms. 458, in which the wife was mortgagee in fee, and the decision was against her, she being plaintiff (and then a widow), the Master of the Rolls, recognising the rule, says that 'it might have been a matter of different consideration if the assignee had been plaintiff in equity, and desired the aid thereof to strip the unfortunate widow of all that she had in the world, towards the doing of which equity would hardly have lent any assistance.'

"Many cases followed, in which the principle was recognised; and in *Burdon* v. *Dean*, 2 Ves. jun. 607, the assignees of a bankrupt husband filed a bill, praying that they might be entitled, during the joint lives of the bankrupt and his wife, to the income of certain freehold, leasehold, and personal estates, to which the wife was entitled for life; upon which the Master of the Rolls said, 'I have no objection to what they can get at law, but if they come into this Court, I will not extend the arm of the Court to give them any other part of her property, without a consideration for it; therefore let it be referred to the Master, that they may lay proposals before

him.' It was said that the order in this case was by consent. That I think immaterial, as it does not affect the observation of the Master of the Rolls, for which alone the case is of any value.

"In *Oswell* v. *Probert*, 2 Ves. jun. 680, the husband having become bankrupt, Lord *Rosslyn* said, 'Where persons claiming in right of the husband are obliged to come into an equitable jurisdiction, to obtain the benefit of any part of the property, the destination of which is for the enjoyment of the husband and wife, the Court will not apply it to the use of the husband, leaving the wife to starve. Whatever the husband takes in right of his wife, is, in itself, a provision for the maintenance of both;' and in *Ball* v. *Montgomery*, 4 Bro. C. C. 338, the equity of the wife was put upon the same ground. In *Brown* v. *Clark*, 3 Ves. 166, Lord *Alvanley* said, the assignees of the husband 'must make a provision for the wife before they can call it out of this Court.' In *Freeman* v. *Parsley*, 3 Ves. 421, Lord *Rosslyn* directed a provision for the wife against the assignees of her husband upon the same principle. In *Mitford* v. *Mitford*, 9 Ves. 87, Sir *W. Grant* said, 'It is upon the ground that the assignees want its assistance to reduce the property into possession that this Court imposes upon them the condition on which alone it would have assisted the husband to obtain possession.' In *Wright* v. *Morley*, 11 Ves. 12, Sir *W. Grant* said, 'In *Pryor* v. *Hill*, 4 Bro. C. C. 139, it was contended that the equity of the wife did not extend to the case of a life-interest, upon the principle that the husband becomes absolute purchaser of that upon the marriage, in consequence of the obligation to maintain his wife thereby contracted. That argument, however, did not prevail. The life-interest passes to the assignees, subject to the ordinary equity for a settlement.' In *Elliott* v. *Cordell*, 5 Madd. 149, Sir *J. Leach*, though he thought that the title of a particular assignee of the property of the wife then in dispute was good against her claim to maintenance out of it, yet said, that if the husband had been bankrupt, the Court would have fastened upon his assignee the obligation of maintaining the wife out of any property of hers; which must be understood to assume the case of the assignee's applying for the assistance of this Court to obtain such property.

"From these authorities, and many others which recognise the same principle, it appears that the equity which this Court administers in securing a provision and maintenance for the wife, is founded upon the well-known rule of compelling a party *who seeks equity to do equity;* and it is not possible to conceive a case

more strongly calling for the application of that rule. The common law gives to the husband the enjoyment of the life estate of the wife, upon the ground that he is liable to maintain her, and makes no provision for the event of his failing or becoming unable to perform that duty. If the life estate be attainable by the husband or his assignee at law, the severity of this law must prevail; but if it cannot be reached otherwise than by the interposition of this Court, equity, though it follows the law, and therefore gives to the husband or his assignee the life estate of the wife, yet it withholds its assistance for that purpose, until it has secured to the wife the means of subsistence; it refuses to hand over to the assignee of the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both. Upon the same principle, the ordinary interposition of this Court, in compelling a settlement of the property of married women, was originally founded, although the wife is permitted actively to assert her equity as a plaintiff; and if such be the principle, what difference can it make, where the assignees of the husband are applying to this Court for its assistance to obtain the property, that the estate of the wife is not a trust, but that the recovery at law is prevented only by the existence of a prior legal trust estate? It happens, however, that in *Oswell* v. *Probert*, before referred to, the estate of the wife was the same as in this case. The testator had devised his estate to trustees in fee, upon trust to pay certain annuities and legacies, and the trustees were directed to stand seised to the use of his daughter, the wife of the bankrupt, for her life. The estate had, indeed, been sold to pay the prior charges; but it being evident that the trust was subsisting, and the legal estate in the trustee, the Court said, that the assignees were in the place of the husband not maintaining the wife, and declared that a provision was to be made for her." See *Bonfield* v. *Hassell*, 32 Beav. 217; *Barnes* v. *Robinson*, 11 W. R. (V. C. S.) 276; but see *Gleaves* v. *Paine*, 1 De G. Jo. & Sm. 87, where Lord *Westbury*, C., said that, although the decision of *Sturgis* v. *Champneys*, being a decision of the Lord Chancellor, must be followed, yet he was not disposed to extend it any further than the actual decision went, and that, as in that case the assignees were plaintiffs, it would extend the rule very much to recognise the doctrine that a wife might come here asking a settlement of real estate belonging to the husband against the husband's assignee, which the assignee could render available without resorting to the Court of Chancery.

Whether a wife may not be entitled in some cases to an equity

of settlement out of a legal chose of action, as for instance a debt, as against the legal rights of her husband, is perhaps doubtful. In the recent case of *Ruffles* v. *Alston*, 19 L. R. Eq. 539, 546 (where, however, it was unnecessary to decide the point, as it was held that the chose in action in question was already comprised in a settlement whereby the debtor had constituted himself a trustee thereof), Vice-Chancellor Malins said, "If the settlement does not stand, then I should require it to be more solemnly argued than this case has been before I could come to the conclusion that, under no possible circumstances, could a wife avail herself of the machinery of this Court to obtain a settlement out of money secured to her, before her marriage, by a promissory note, a bill of exchange, or a bond. If a wife were to file a bill making the debtor and her husband parties, which in that way would become a sort of interpleader suit, she setting up that her husband had deserted her, left her unprovided for, and a burthen on the parish or on her friends—the husband having a legal right to recover that debt—I cannot think that this Court is so powerless that she could not, in such a case as that, enforce a settlement."

Whatever may be the right of a married woman to have a provision made for her out of the *income* of an estate of which she is equitable tenant in tail, it is not according to the course of the Court, or indeed in its power, to order a settlement to be made of the estate or land to be purchased with money of which the married woman is equitable tenant in tail. For it is clear that the equity for a settlement attaches upon what the husband takes in right of the wife, and not upon what the wife takes in her own right, and the estate tail being in the wife, the Court has no power to order a settlement of it to be made, or to render such a settlement, if made, binding and effectual against the wife: *Life Association of Scotland* v. *Siddal*, 3 De G. F. & Jo. 271, 276.

Where copyhold property descended in fee upon a married woman, subject to a covenant entered into by a former owner upon his marriage to surrender it to certain uses, under which, had the surrender been made, the married woman would have been legal tenant in tail, it was held by the Lords Justices that she had no equity to a settlement out of property so circumstanced: *Re Cumming*, 2 De G. F. & Jo. 376.

In *Freeman* v. *Farlie*, 11 Jur. 447, where a sum of money, being rent of real estate (not, as it seems, equitable) to which a husband was entitled jure mariti, was paid into court by an agent, Sir *L. Shadwell*, V. C., upon the authority of *Sturgis* v. *Champneys*, held that the assignee of the husband (who

was insolvent) was not entitled to it, without a settlement upon the wife; and see *Life Association of Scotland* v. *Siddal*, 3 De G. F. & Jo. 271.

Notwithstanding the doubt thrown out by Lord *Alvanley* in *Macaulay* v. *Philips*, 4 Ves. 19, it is now clearly settled, overruling what is supposed to have been decided in *Sir Edward Turner's Case* (1 Ch. Cas. 307, 1 Vern. 7, see *Sanders* v. *Page*, 3 Ch. Rep. 223), that a wife will be entitled to a settlement out of her trust term in land, not only as against her husband, but also against his assignee for valuable consideration. Thus, in *Hanson* v. *Keating*, 4 Hare, 1, where a husband and wife assigned, by way of mortgage, the equitable interest of the husband in right of his wife in a term of years, the mortgagee filed his bill against the husband and wife, and the trustee of the legal estate, for a foreclosure and assignment of the term; it was held by Sir *J. Wigram*, V. C., upon the authority of *Sturgis* v. *Champneys*, although contrary to his own opinion independent of that case, that the wife was entitled to a provision for her life, by way of settlement, out of the mortgaged premises. "I am clear," observed his Honor, "that I am not bound in this case, to impose upon the plaintiff the terms required by the defendant, only because he is plaintiff (for that was the argument at the bar). The question is, what are the equitable rights of the parties, independently of their relative positions on the record? Sir *Edward Turner's Case*, 1 Vern. 7, if it be law, answers this question. Now it is true, that some judges have thought the resolutions in that case questionable; but it is equally true, that they have considered it as binding upon all courts until the House of Lords should alter its own resolutions: *Pitt* v. *Hunt*, 1 Vern. 18; *Jewson* v. *Moulson*, 2 Atk. 417; and unless I am altogether under a mistake, Sir *Edward Turner's Case*, has always been, and is at this day, considered law by conveyancers, and is acted upon accordingly. And the more strong has been the dissent from the resolutions in that case, the more do the judges who express that dissent affirm the authority of the case by following it. I believe the understanding of the profession, prior to the decision of *Sturgis* v. *Champneys*, to have been that Sir *Edward Turner's Case*, was in accordance with the principles of the Court: and I advert to that understanding the more, not only because the Vice-Chancellor of England concurs in it, but because I know the learned editor of Mr. Roper's book on the law of Husband and Wife always lamented the decision in *Sturgis* v. *Champneys*, as having, in his opinion, unsettled the law. In some cases of mere personalty there is no doubt of the wife's equity; but, prior to *Sturgis* v.

Champneys, the opinion of the profession had, I believe, become settled, that estates in land were not subject to the same equity, upon the broad and important principle of preserving a strict analogy between legal and equitable estates in land. In the case of *Burdon* v. *Dean*, 2 Ves. jun. 607, the order was made by consent; and Lord *Cottenham* notices that circumstance in *Sturgis* v. *Champneys*. I shall not, however, decide this case without attentively reading *Sturgis* v. *Champneys* in private."

On a subsequent day, his Honor, deciding in favour of the wife, observed, "At the close of the argument in this case, I stated what my understanding of the law was; and I reserved to myself the duty only of examining the case of *Sturgis* v. *Champneys*, to determine whether I could act in this case upon my individual opinion as to the law, without directly impugning the plain tenor of Lord *Cottenham's* judgment in that case. My opinion is, that I cannot do so; and, therefore, in deference to that judgment, I shall follow it, although, if that case were out of the way, I should probably have decided otherwise. There would be no difficulty in distinguishing the facts of this case from those in *Sturgis* v. *Champneys*; but the reasoning in that case would remain, and I cannot disregard it."

The estate of a feme covert tenant in tail in possession, subject to a term to secure a jointure, has been held to be equitable during the continuance of the term, for the purpose of entitling her to a settlement on a bill filed by her. See *Wortham* v. *Pemberton*, 1 De G. & Sm. 644. "Although," said Sir *J. L. Knight Bruce*, V. C., in that case, "the plaintiff and her husband, or he in her right, may have the immediate legal freehold, there is a legal title which prevents the enjoyment except by means of a Court of equity, and renders the title to the rents equitable so long as the term lasts; and it appears to me that the plaintiff is entitled to a settlement out of the rents during the joint lives of herself or the husband, or until the determination of the term; the remaining question being, whether if the term shall by the clause of cesser, determine during the joint lives, the settlement can endure beyond that period." His Honor heard the plaintiff's counsel in reply to this question, and held that the settlement could not be made beyond the jointure term.

Although the Court might allow the wife the income of her property, it by no means follows, when the property out of which she claims a settlement is in the hands of a mortgagee, that he will be allowed by the Court, as against the assignees of the husband, what he may have paid to the wife, out of the income of the property. Thus, in *Clark* v. *Cook* (3 De G. & Sm. 333), a husband and wife,

by deed acknowledged, demised freeholds of the wife to a mortgagee by way of trust, the trusts being to apply the rents and profits in payment of certain premiums of insurance, and of the interest on the mortgage debt, and then in reduction of the principal, until it should be paid off. The husband took the benefit of the Insolvent Debtors' Act. It was held by Sir *J. L. Knight Bruce*, V. C., in a suit for redemption, instituted by the assignee of the husband against the mortgagee, that the latter was chargeable with the surplus rents which he allowed to the insolvent's wife for her maintenance. "I cannot help suspecting," said his Honor, "that the wife might have had all that has been paid to her if a proper application had been made to the Court. It is a hard and peculiar case, and there must be no costs on either side."

Where, however, a person entitled, jure mariti, to the legal interest in leaseholds, mortgages them, the wife has no equity to a settlement thereout, as against the mortgagee seeking foreclosure or sale (*Hatchell* v. *Eggleso*, 1 Ir. Ch. Rep. 215), but if the proviso for redemption in such a case is on the repayment of the sum advanced, by the husband (who has become insolvent), and his wife, the power to redeem must be given to her as well as the insolvent's assignee: *Hill* v. *Edmonds*, 5 De G. & Sm. 603.

Although it was once doubtful, it seems to be now fully established, that a wife is entitled to a settlement out of a *life interest* in equitable property to which her husband is entitled in her right, as against his *assignees, upon his becoming bankrupt or insolvent.* Thus, in *Lumb* v. *Milnes*, 5 Ves. 517, a wife having a life interest in the dividends of a fund, was held entitled to a settlement as against the assignees of her husband, who was a bankrupt. The same was held, also, in *Brown* v. *Clark*, 3 Ves. 166; *Jacobs* v. *Amyatt*, 1 Madd. 376, n.; and *Squires* v. *Ashford*, 23 Beav. 132; and in *Sturgis* v. *Champneys*, 5 My. & Cr. 97, which has been already given at considerable length, Lord *Cottenham* held, that the wife was entitled to a settlement out of the rents of lands devised to her for life; see also *Vaughan* v. *Buck*, 1 Sim. N. S. 284; *Kocber* v. *Sturgis*, 22 Beav. 588.

The wife is also entitled to a settlement or maintenance out of her equitable life interest when she is deserted by her husband. See *Gilchrist* v. *Cator*, 1 De Gex & Sm. 188, and cases cited *post*, p. 515.

It has, however, been held by Sir *L. Shadwell*, V. C., that the wife is not entitled to a settlement out of a life interest when she is living with and is maintained by her husband, who is neither bankrupt nor insolvent. Thus, in *Vaughan* v. *Buck*, 13 Sim. 404, a married woman, having a life interest in a fund in court, presented a peti-

tion, praying that a portion of the income, and of the arrears of it, might be settled to her separate use. It seems she was living with her husband and was maintained by him; but, as she alleged, in a manner very inadequate to her fortune, as he was in embarrassed circumstances, and had no property of his own, except his wife's income. Sir *L. Shadwell*, V. C., said, that he could not interfere with the right of the husband to receive his wife's income. They were living together, and he was maintaining her as well as he could.

Nor is the wife, it seems, entitled to a settlement out of property in which she has an equitable *life interest*, as against a person to whom her husband has *assigned it for value* previous to his insolvency or his desertion of her. Thus, in *Elliott* v. *Cordell*, 5 Madd. 149, the dividends of 9000*l.*, Three per Cents., were given to a married woman for her life, with a bequest over. The husband and wife joined in a sale of this life interest, and the husband afterwards became a bankrupt. A bill being filed by the wife against the purchaser, insisting upon a provision, *Sir John Leach*, V. C., held, that she was not entitled to one. "I find," observed his Honor, "no authority for the equity claimed by the wife as against the *particular assignee*, in the case of an interest given to the wife for her life; and it does not follow, as a corollary or consequence, from any established doctrine of the Court. Where an *absolute* equitable interest is given to the wife, the Court will not permit the husband to possess it, without making a provision for the wife, or her express consent; and all who claim under the husband must take his interest, subject to the same equity. But, where an equitable interest is given to the wife, *for her life only*, this Court does permit the husband to enjoy it without the consent of the wife, and without making any provision for her. It is true, that if the husband desert his wife, and fail to perform the obligation of maintaining her, which is the condition upon which the law gives him her property, this Court will apply any equitable interest which he retains for the life of the wife, either wholly or in part, for the maintenance of the wife; and, if the husband becomes bankrupt, or takes the benefit of an insolvent debtors' act, this Court will fasten the same obligation of maintaining the wife out of the property of this description which devolves by act of law upon the general assignee; for, when the title of such assignee vests, the incapacity of the husband to maintain the wife has already raised this equity for the wife; but the same principle does not necessarily apply to a *particular assignee for a valuable consideration*, who purchased this interest when the husband was main-

taining the wife, and before circumstances had raised any present equity in this property for the wife, whatever may be the force of general reasoning upon it. If, however, I considered it to be useful, that the same rule should be applied to the particular assignee, as to the general assignee, which may be doubted, by declaring this rule in the absence of all direct authority, and of all authority leading necessarily to the same conclusion, I fear that I should not be administering the actual law of this Court, but I should be making a new law, and I cannot venture to assume such a jurisdiction."

Again, in *Stanton* v. *Hall*, 2 Russ. & My. 175, lands were devised to trustees upon trust to pay the rents and profits to J. H. for life; but, if he should attempt to assign the same, or should commit an act of bankruptcy, or become insolvent, then upon trust to pay thereout to the wife of J. H. an annuity of 100*l.* during his life, and, after his decease an annuity of 30*l.* during her widowhood, and upon certain other trusts for the children of the marriage. It was held by Lord *Brougham*, on the authority of *Elliott* v. *Cordell*, that the annuity of 100*l.* not being for the separate use of the wife, passed by the husband's assignment to a purchaser for value, and that, as against such purchaser, the wife had no equity for a settlement out of the annuity.

The case of *Vaughan* v. *Buck* has, indeed, been disapproved of by Lord *Langdale*, M. R., in *Wilkinson* v. *Charlesworth* and *Marsack* v. *Lyster* (reported together, 10 Beav. 324). In the latter case, the personal representative of a man who died, leaving his wife surviving him, claimed to be entitled to the income of her life estate in certain funds which accrued due in his lifetime; in the former case, a cestui que trust, under an assignment made by the husband, claimed to be entitled to the interest which accrued due in his lifetime upon the portion or portions to which he was entitled in right of his wife. It was argued, that if the husband maintained his wife, he acquired an independent right to her income accrued due in his lifetime, and that any arrears passed to his legal personal representative or assignee, in opposition to the right of his wife. His Lordship, however, said, that the sums of money claimed by the cestui que trust, under the husband's assignment, were choses in action of the wife, not possessed or reduced into possession by the husband when he died, and he was, therefore, of opinion, that the wife became absolutely entitled to them by survivorship. "I have read," observed his Lordship, "the papers with which I have been supplied, in the case of *Vaughan* v. *Buck* (which is reported in 13 Sim. 404), and also a copy of the order which was made; and if the order was right, it does seem to be an authority for

the proposition stated and relied on in the argument, that whilst the husband and wife are both living, the husband maintaining the wife is absolutely entitled to the whole of her income, in opposition to her claim to a settlement out of her life estate.

"As the case occurred during the lives of both husband and wife, it does not govern the point which I have now to consider; and I should have wished to abstain from expressing any opinion upon it; but considering how constant the practice of the Court has been, and how frequently the question may be raised, I feel it my duty to say, that, notwithstanding the case of *Vaughan* v. *Buck*, I must adhere to the rule which I consider to be established in such cases." See also *Bond* v. *Simmons*, 3 Atk. 20.

In the case, however, of *Tidd* v. *Lister*, 10 Hare, 140, it was held by Sir *George Turner*, V.-C., that a married woman whose husband did not maintain her, was not entitled, as against a *particular assignee* of the husband, to a settlement, or maintenance out of the income of the real and personal estate to which she was entitled in equity *for her life*. After referring to *Wright* v. *Morley*, 11 Ves. 12, and to the cases of *Elliott* v. *Cordell* and *Stanton* v. *Hall*, decisions against the right of the wife, his Honor observed, "It was strongly argued in this case, as it was in *Elliott* v. *Cordell*, that there could be no distinction between the cases in which the wife took a life interest only, and those in which she took an absolute interest, in which latter cases her right to a settlement was fully established against the assignee of her husband for valuable consideration; and that there could be no distinction between the particular assignee for value of the husband, and his general assignee in bankruptcy or insolvency: but there are distinctions between these cases which cannot be disregarded.

"In the cases where the wife takes an absolute interest, the provision is for her and her children. She cannot claim it for herself alone. In the cases where the wife takes a life interest, the provision is for her separate benefit, independently of the children, a distinction pointed out by Sir *William Grant*, in *Wright* v. *Morley*. Again, in the cases where the wife takes an absolute interest, her right to a provision for herself and her children is independent of the acts and conduct of her husband; in the case where she takes a life interest only, her right to a provision for herself arises from the non-fulfilment by him of his obligations, and is wholly dependent upon his acts and conduct. In the cases, too, where the wife takes an absolute interest, the purchaser takes subject to the well-known and settled equity; but where the wife takes for life only, the equity

by which it is said the purchaser must be bound may not exist at the time of his purchase, and depending as it does on the conduct of the husband, may never come into existence: and in this respect, also, there is a great distinction between the particular assignee for value and the general assignee; for in the case of the general assignee, the very bankruptcy or insolvency on which his title is founded creates the right against him. Considering the question, without reference to the authorities, it must, I conceive, resolve itself into this point: Ought a Court of equity in these cases, against purchasers for value, to follow the law which gives to the husband the power of dealing with the income of his wife's property, or ought it to put in force its ordinary rule, that "he who comes into equity must do equity"? the rule on which, as I believe, both the rights of married women to provisions for their maintenance and their rights to settlements are founded. In determining this point, the inconveniences which would ensue from the Court's acting upon the rule to which I have referred, must not, I think, be thrown out of view. Purchasers would become involved in inquiries into the relation between husband and wife, the extent of their other property, and their other means of maintenance; and the life interest of married women would become incapable of being dealt with, whatever might be the exigencies of the case. Looking to these consequences, and to the distinctions which I have pointed out, and not of course intending the observations which I have made to apply to a case of fraudulent alienation for the purpose of defeating the claims of the wife, I must confess myself unable to find any clear principle on which I can dissent from the decisions to which I have referred. . . . Much reliance was placed on the observations of Lord *Langdale* in *Wilkinson* v. *Charlesworth*; but that was a question between the representative of the husband and the wife surviving; and Lord *Langdale*'s observations seem to have been directed against what had fallen from the late Vice-Chancellor of *England* in *Vaughan* v. *Buck*, 13 Sim. 404, as having indicated a doubt whether the wife could in any case be entitled to a provision for maintenance out of her life interest. His Lordship could not, I think, have intended to say, that in every case, and as against every person, she would be so entitled; for in *Wright* v. *Morley*, 11 Ves. 17, to which he refers, Sir *William Grant* puts the wife's right to a provision on the absence of the husband, and his having left her unprovided for, and directed an inquiry as to these points before he could make the order in favour of the wife. Indeed, I can find no case in which a wife has come to the Court for such a provision except under special

circumstances; and certainly no case in which she has succeeded in obtaining it against an assignee for value of her husband." This decision was on appeal affirmed by Lord *Cranworth*, C., who, with reference to the distinction in principle, supposed to rest between the mode of dealing with the purchaser of a wife's life interest, and the purchaser of her absolute interest, said, "that they are altogether satisfactory to my mind, I am not prepared to say; at the same time they are certainly not without weight, and considering the authorities are all one way, I think it would be very inexpedient now to attempt to disturb them." See 3 De G. Mac. & G. 857, 870; see also *Durham* v. *Crackles*, 11 W. R. (V.-C. W.), 138; *Re Duffy's Trust*, 28 Beav. 386.

With regard to *Elliott* v. *Cordell*, it is clear, since the decision of *Stiffe* v. *Everett*, 1 My. & Cr. 37, that the assignment of a life interest of a married woman in a fund not settled to her separate use, could not, unless it came within the provisions of Malins' Act, (20 & 21 Vict. c. 57), in any event, be supported beyond the period of the joint lives of the husband and wife. *Stanton* v. *Hall*, it will be observed, differed from *Elliott* v. *Cordell*, inasmuch as the interest of the wife was determinable upon the death of her husband. See *In re Godfrey's Trusts*, 1 I. R. Eq. 531.

And the husband's assignment for value, when maintaining his wife, of income to which he becomes entitled in her right, will be effectual to deprive her of her equity to a settlement as against the assignee for value, though the interest of the wife at the time of the assignment was reversionary: *Life Association of Scotland* v. *Siddal*, 3 De G. F. & Jo. 271, 276, 277. *In re Carr's Trusts*, 12 L. R. Eq. 609.

A wife is entitled to a settlement out of property to which she becomes entitled before, as well as out of what she becomes entitled to after marriage: *Barrow* v. *Barrow*, 18 Beav. 529.

The Court, however, cannot order a settlement to be made of the reversionary personal property of a married woman. The reason for this is, that the right to the settlement, is an obligation which the Court fastens, not upon the property, but upon the right to receive it, and if the right attaches at all, it must attach with all its incidents, one of which is, that the wife waiving it, must waive it by her consent in Court, which she cannot do in the case of reversionary personal property; *Osborn* v. *Morgan*, 9 Hare, 432, 434; the question, as to whether a wife is entitled to a settlement can only be decided when the reversionary property falls into possession; *Ib.* and see *Taylor* v. *Austen*, 1 Drew. 459, 464; but see now Malins' Act (20 & 21 Vict. c. 57).

Upon the same principle where

the husband of a legatee is indebted to the testator's estate, and he has no right to receive any part of the assets, in right of his wife, his wife can claim no equity to a settlement in respect thereof. See *Knight* v. *Knight*, 18 L. R. Eq. 487; there L. J. by her will, directed her executor to convert her residuary estate into cash and divide the same equally among her brother and sisters, and appointed K., the husband of one of her said sisters, sole executor. A bill having been filed by the wife against her husband, the executor, upon the accounts being taken a large balance was found due from him which he was unable to pay; there was also a sum of Consols, and money standing to the credit of the cause. The wife claimed to enforce her equity to a settlement out of the Consols and money in Court. Sir *Charles Hall*, V.-C., held that she was not so entitled. "Here," said his Honor, "the question is this. The executor is the husband of one of the residuary legatees, and is found on taking the account to be considerably indebted to the testator's estate. Nothing has as yet come to his wife; then is it competent for her to say to her husband, 'You, as between yourself and the other legatees, cannot claim anything in respect of my share, but I, as one of the residuary legatees, claim my share out of the assets that are in Court.' Can the wife say that, when her husband being executor has not discharged his liability to the estate? It seems to me that the other legatees may rightfully insist that no part of the existing assets shall be taken by the husband so long as anything remains due from him, that the wife's equity only attaches to such property as the husband is entitled to receive in his marital right, and that there being no such property, there is no such equity in the wife. In *Osborn* v. *Morgan* (9 Hare, 432), it was held that the wife's equity to a settlement does not depend on any right of property in her, but rests on the control which courts of equity exercise over property falling under their dominion; and that the right to a settlement is an obligation which the Court fastens, not upon the property, but upon the right to receive it. Where, therefore, a testator gives a share in his property to a married woman and appoints her husband executor, the husband becomes primarily responsible for the whole estate, and the distribution of the assets must proceed on that footing. The defendant, so long as he is indebted to the estate, can have no right to receive in right of his wife any part of the assets, and consequently no equity to a settlement of any part of the assets can arise to the wife."

Rights of the children.]—When-

ever a woman insists upon her equity to a settlement, it will always be extended to her children, and a reference will, as in *Lady Elibank* v. *Montolieu*, be directed to ascertain what is a proper settlement to be made upon her and her children (*Johnson* v. *Johnson*, 1 J. & W. 472; *Re Grant*, 14 W. R. (V.-C. S.), 191): and in *Conington* v. *Gillat*, Weekly Notes, Dec. 2, 1876, p. 275, the children of a former marriage were provided for.

The equity to a settlement, however, is strictly personal to the wife. If, therefore, she dies before asserting her right, her children cannot insist upon a settlement. Thus, in *Scriven* v. *Tapley*, 2 Eden, 337, where a man after the death of his wife, leaving a daughter, filed a bill to obtain the payment of 300*l.*, to which his wife was entitled, Lord *Northington*, reversing the decision of Sir *Thomas Clarke*, M. R., held that the daughter had no equity to a settlement out of it. "The equity of compelling settlements," observed his Lordship, "first arose upon the husband's coming to this court for assistance. It is *personal to the wife*, and, if carried further, would be attended with ill-consequences to creditors. There is no case where the Court has refused assistance to the husband, after the death of the wife, upon the terms of his making a provision for the children." Sir *William Grant*, it will be observed, when *Murray* v. *Lord Elibank* came before him, cited the decision of Sir *Thomas Sewell*, M. R., in *Cockel* v. *Phipps*, 1 Dick. 391, in support of the decision of Sir *Thomas Clarke*, which he seems to have preferred to that of Lord *Northington*; however, Sir *Thomas Plumer*, M. R., in his elaborate judgment in *Lloyd* v. *Williams*, 1 Madd. 464, said that, on consulting the Registrar's Book, he found the point never arose in *Cockel* v. *Phipps*, and that no case had touched upon the decision of Lord *Northington* in *Scriven* v. *Tapley*, and that from that time the decisions had been uniformly according to that case, and that it would indeed have been surprising, if so correct a judge as Sir *Thomas Sewell* should, so soon after the decision in *Scriven* v. *Tapley*, have acted in direct contradiction to it.

The wife, therefore, may, at any time before the settlement is actually completed, *waive* her right to it, and thus defeat the interests of her children. "That the children," observes Lord *Cottenham*, "have no equity of their own, that it is only the equity that they obtain through the consent of the mother, is sufficiently clear from the fact, that if the mother, having attained the age of twenty-one, comes into Court, and consents that the property shall be paid over to the husband, the Court will permit it to be paid over, without reference to the interests of the children; but in no instance are the

children permitted to assert an independent equity of their own; and in no instance has that right ever been permitted against the mother. It is against the father that the Court exercises jurisdiction, to exclude him from those rights which the law would otherwise give him; and then the Court deals with those rights as between the mother, whose property it is, and as between the children of the marriage, in such a way as may be thought for the interests of the family:" *Hodgens* v. *Hodgens*, 11 Bligh, N. S., 104.

Sir *Thomas Plumer*, V.-C., in *Lloyd* v. *Williams*, 1 Madd. 467, after an elaborate review of all the authorities, observes, that all the cases concur in showing that children have no right to a settlement "independent of *contract or decree*."

When the wife has entered into a contract, or has obtained a decree for a settlement, the interests of the children will not be defeated if she die without waiving it. Thus, as in *Lady Elibank* v. *Montolieu* and *Murray* v. *Lord Elibank*, where by a decree a reference was made to approve of a proper settlement, and the wife died without waiving it (which, as before observed, she might do), her children, by supplemental bill, successfully claimed the benefit of the decree, although no proposals for a settlement had been made, and although they had not been mentioned in the decree. See *Rowe* v. *Jackson*, Dick. 604; *Groves* v. *Perkins*, 6 Sim. 584; *S. C.*, *Groves* v. *Clarke*, 1 Kee. 132. But if no mention is made of the children, the omission, if it has been long acquiesced in, will not be supplied. Thus, in *Johnson* v. *Johnson*, 1 J. & W. 479, where the interest of a fund in court was directed to be paid to the separate use of a married woman for life, with liberty for those entitled on her death to apply, Sir *Thomas Plumer*, M. R., said, that the Court ought to have referred it to the Master to approve of a proper settlement, instead of making that order; but that, as it was made thirty-four years ago, it could not then be altered.

In *Lloyd* v. *Williams*, 1 Madd. 450, the wife of a bankrupt being entitled to a legacy, *she claimed her right to a settlement out of it*, and an agreement was thereupon entered into between the assignees and the executor, whereby, in consideration of a sum to be paid to the assignees, a settlement was to be made upon the wife and her children. The bankrupt obtained his certificate in the lifetime of his wife, who died before any settlement was made in pursuance of the agreement, leaving an only daughter. Sir *Thomas Plumer*, V.-C., held, that the death of the mother did not disappoint the claim of the child.

In *Lloyd* v. *Mason*, 5 Hare, 149, a married woman entitled to a legacy appeared by her counsel at the hearing of the cause, and

claimed her equity to a settlement out of the fund. The legacy was directed to be carried to the separate account of the husband and wife. The husband was a bankrupt, and his assignee sold his interest in the legacy. The solicitors for the purchaser, and for the wife, agreed to refer the claim of the wife to their counsel; and the counsel determined that she was entitled to a settlement of a moiety, subject to the costs. Before any further steps were taken, the wife died, leaving children. It was held, by Sir *James Wigram*, V.-C., that the husband, and those claiming under him, were, by the steps which had been taken, bound to allow a settlement of part of the fund upon the wife and children; and that, upon the death of the wife, the children were entitled to the portion which would have been settled. "If," said his Honor, "in order to decide this case, an obligation had been imposed upon me, of deciding between the conflicting opinions of Sir *John Leach* and Lord *Langdale*, I should certainly have taken a great deal of time to consider the matter. But I may, I think, decide the case without expressing an opinion upon that point; and the only observation which it will be necessary to make is this: It appears that the question, whether the children can, after the death of their mother, insist upon her equity to a settlement, depends not upon the question, whether the mother was bound, but upon the question, whether the father was bound. It is clear, that an order, referring it to the Master to approve of a settlement, binds the husband, though it does not necessarily bind the wife. There may be a case in which the wife is not absolutely bound, but in which, as against the husband, the children are entitled to the benefit of the mother's equity. If the husband is bound, the children are certainly entitled. The question, whether the husband is, or is not bound, must be governed by the ordinary principles of the Court."

But it has been decided that if a married woman dies without having obtained a decree for a settlement, her children, even although she may have filed her bill claiming a settlement, will have no right to file a supplemental bill to enforce one: *Wallace* v. *Auldjo*, 2 Drew. & Sm. 216; 1 De G. Jo. & Sm. 643. And see *De la Garde* v. *Lempriere*, 6 Beav. 344; *Baker* v. *Bayldon*, 8 Hare, 210, overruling *Steinmetz* v. *Halthin*, 1 G. & J. 64.

Moreover, although the husband, in the event of his wife's death, is bound by a contract or decree for a settlement, yet the wife can, at any time before it is actually made, waive her equity to a settlement. *Fenner* v. *Taylor*, 2 Russ. & My. 190, where Lord *Brougham*, C. reversed the decision of Sir *John Leach*, V.-C., reported 1 Sim. 169. See also

Fenner v. *Taylor*, 2 Russ. & My. 195.

Upon the same principle, in *Baldwin* v. *Baldwin*, 5 De G. & Sm. 319, the wife of a lunatic being entitled to a share of the residue of an intestate's personal estate, filed a bill against her husband, praying a settlement of the fund on herself and children. After inquiries in the lunacy, the committee was authorised to assent to a settlement of one half of the fund; and by an order made in the cause, it was referred to the Master to approve of a settlement. The Master accordingly approved of a settlement, by writing at the foot of the draft, and no further proceedings were had when the lunatic died. The wife subsequently died, having by will disposed of the whole fund. It was held by Sir *James Parker*, V.-C., that the proposal in the Master's office had not been proceeded with to such a stage at the time of the lunatic's death as to preclude his wife from retiring from the proposed settlement; and the Court ordered the whole amount of the fund to be paid to the representatives of the wife. See *Lovett* v. *Lovett*, Johns. 118.

But if the wife, upon the bankruptcy of her husband, established her equity to a settlement, as against the assignees, she will not be allowed afterwards to waive it in favour of her husband, so as to defeat the rights of her children, although she might do so in favour of the assignees: *Barker* v. *Lea*, 6 Madd. 330; *Whittem* v. *Sawyer*, 1 Beav. 593.

As to the amount of the wife's property to be settled.]—When the husband is solvent, the amount to be settled upon the wife and children depends generally upon arrangements entered into between the husband and wife. And as we shall hereafter state more fully, if he declines to agree to a settlement, the Court will, in general, if he has been guilty of no misconduct, allow him to receive the income of her property (*post*, p. 515). The amount however of the wife's property which is to be settled, is most frequently discussed in Court when he has become either bankrupt or insolvent.

The rule in general is, that, in the absence of special circumstances, one half of the wife's property shall be settled upon her, and the other half go to the husband or his assignees: *Jewson* v. *Moulson*, 2 Atk. 423; *Worrall* v. *Marlar*, 1 Cox, 153; 2 Dick. 647; *Brown* v. *Clark*, 3 Ves. 166; *Bagshaw* v. *Winter*, 5 De G. & Sm. 466; and see *Dunkley* v. *Dunkley*, 2 De G. Mac. & G. 396; *Re Groves' Trust*, 3 Giff. 575; *Spirett* v. *Willows*, 1 L. R. Ch. App. 520. But this is a matter in the discretion of the Court, which, taking into consideration the amount of the wife's fortune already received by the husband, or any previous settlement which

may have been made, may settle a larger proportion of the fund. See *Green* v. *Otte*, 1 S. & S. 250; *Napier* v. *Napier*, 1 D. & W. 407; *Aubrey* v. *Brown*, 4 W. R. 425; and in *Coster* v. *Coster*, 9 Sim. 597, where, a husband having, without sufficient cause, separated from his wife, leaving her unprovided for, three-fourths of a fund in Court, arising from property bequeathed to the wife, was ordered by Sir *L. Shadwell*, V.-C., to be settled on her and her issue generally and the remaining fourth to be paid to the husband. See also *Ex parte Pugh*, 1 Drew. 202; *Vaughan* v. *Buck*, 1 Sim. N. S. 284. *In re Suggitt's Trusts*, 3 L. R. Ch. App. 215.

It was at one time laid down by a very careful judge that the Court would not settle the whole of the property upon the wife. See *Beresford* v. *Hobson*, 1 Madd. 362, where the husband was a bankrupt. In the case, however, of *Jacobs* v. *Amyatt*, 1 Madd. 376 (which was cited in *Beresford* v. *Hobson*) the whole of a legacy seems to have been settled upon the wife, as against the assignees of her husband, who was a bankrupt. Again, in *Brett* v. *Greenwell*, 3 Y. & C., Ex. Ca. 230, where the husband had taken the benefit of the Insolvent Debtors' Act, *Alderson*, B., said that he did not understand *Beresford* v. *Hobson*, and held the wife and her children entitled to the whole of the fund in Court, laying weight upon the distinction that formerly existed between bankruptcy and insolvency—viz., that if an insolvent afterwards acquired property, neither the wife nor the children would be benefited by it, but the whole went to the creditors; but a bankrupt, on the other hand, after he had obtained his certificate, was a free man. However, in *Napier* v. *Napier*, 1 D. & W. 407, where there was a fund in Court, amounting to 1000*l.*, the property of a married woman, whose husband had been discharged as an insolvent, Lord Chancellor *Sugden* ordered 600*l.* to be applied for the benefit of the wife and her children, and 400*l.* to be paid to the assignee, for the benefit of the creditors; and his Lordship observed, "that, in his opinion, *Brett* v. *Greenwell* could not be supported; for, however true it was, as stated in that case, that there did exist a difference as to the operation of bankruptcy and insolvency upon after-acquired property, upon which difference the decision there was rested, yet there was no distinction as to the rights of assignees in the property of the bankrupt or insolvent at the time of the happening of the bankruptcy or insolvency, upon which rights the practice in bankruptcy alone could have been founded. The assignee of an insolvent husband must take the same interest in the wife's choses in action that the assignee of a bankrupt husband did."

Lord Chancellor *Sugden*, however, in this case, did not mean to lay it down as law that in no case could the Court in its discretion settle the whole fund upon the wife, but he seems to have thought either that the discretion was not properly exercised in *Brett* v. *Greenwell*, or, at any rate, that the distinction as to the rights of assignees in bankruptcy and insolvency laid down by the learned Baron in that case was not correct, and ought not to influence the mind of the Court in the determining what the amount of the settlement should be.

Subsequent decisions have made it clear that under special circumstances the Court will in its discretion settle the whole of the funds belonging to the wife upon her, as for instance when the husband has become bankrupt or insolvent, and has already received a considerable fortune from his wife. Thus, in *Gardner* v. *Marshall*, 14 Sim. 575, where the husband had large advances made to him by his wife's father, and had the benefit of a provision made for his wife by her father's will, and afterwards became bankrupt, Sir *L. Shadwell*, V.-C., held that the wife, who had no provision except the income of a fund under her uncle's will, was entitled to have the whole of that income settled on her for life for her separate use, without power of anticipation. "The question," observed his Honor, "is, in effect, what settlement ought to be made on the wife *out of the whole property which came by her?* and the sums that her father advanced to her husband were, in substance, though not in form, part of her fortune." See, also, *Re Merriman's Trust*, 10 W. R. (V.-C. K.), 334; *Smith* v. *Smith*, 3 Giff. 121.

So also the whole fund may be settled when the husband is insolvent and has made no settlement on his wife (*Francis* v. *Brooking*, 19 Beav. 347; *Scott* v. *Spashett*, 3 Mac. & G. 599. *In re Cordwell's* Estate, 20 L. R. Eq. 644), even as against a purchaser for value from the assignees of the husband (*Ib.*), or as against his own assignee for value (*Marshall* v. *Fowler*, 16 Beav. 249: *Re Welchman*, 1 Giff. 31; *Duncombe* v. *Greenacre*, 29 Beav. 578); but not arrears of income: *Newman* v. *Wilson*, 31 Beav. 34; *In re Carr's Trusts*, 12 L. R. Eq. 609; but see *Life Association of Scotland* v. *Siddal*, 3 De G. F. & Jo. 271.

There will also be a stronger disposition to settle the whole fund upon the wife when it is small and barely sufficient for a provision for the wife and children (*In re Kincaid's Trusts*, 16 Jur. 106; 1 Drew. 326; *Re Hooper's Trusts*, 6 W. R. (V.-C. W.), 824); or where there has been misconduct on the part of the husband, as where he has deserted or behaved cruelly to his wife, and does not afford her the

means of support: *Dunkley* v. *Dunkley*, 2 De Gex, Mac. & G. 390; *In re Cutler*, 14 Beav. 220; *Gent* v. *Harris*, 10 Hare, 383; *Layton* v. *Layton*, 1 Sm. & Giff. 179; *Re Disney*, 2 Jur. N. S. 206; *Koeber* v. *Sturgis*, 22 Beav. 588; *Re Ford*, 32 Beav. 621. But when negotiations had been carried on between the parties for several years, which had involved the assignee in considerable expenses, three-fourths only of the fund instead of the whole were settled: *Walker* v. *Drury*, 17 Beav. 482.

By a decree of judicial separation, the wife's choses in action not reduced into possession at the date of the decree become, under the Divorce and Matrimonial Causes Act (20 & 21 Vict. c. 85), s. 25, her absolute property as if she were a feme sole. Where, therefore, a wife instituted a suit to enforce her equity to a settlement of a trust fund, and while the suit was pending she obtained a decree of judicial separation from her husband on the ground of cruelty, Lord *Romilly*, M. R., ordered the fund to be paid to her, and refused the husband his costs: *Johnson* v. *Lander*, 7 L. R. Eq. 228. See also *In re Coward and Adam's Purchase*, 20 L. R. Eq. 179.

As to the mode of settlement.]—With regard to the general nature of the settlement which the Court will direct to be made, it seems to be clear, that in the absence of special circumstances, the income of a personal fund will be given to the wife to her separate use for life, without power of anticipation, and the fund itself after her death to her children. *Gent* v. *Harris*, 10 Hare, 383, 384; *Francis* v. *Brooking*, 19 Beav. 349. And if there should be no issue, and the wife survives the husband, to her absolutely; but if the husband should survive the wife, then in the absence of special circumstances the Court will not defeat the legal right of the husband, as, for instance, by giving the wife a power of appointment, but give the fund to him (*Carter* v. *Taggart*, 1 De G. Mac. & G. 286, 289; *Bagshaw* v. *Winter*, 5 De G. & Sm. 466; *Watson* v. *Marshall*, 17 Beav. 363; *Smith* v. *Smith*, 3 Giff. 121; *Duncombe* v. *Greenacre*, 29 Beav. 578; *In re Suggitt's Trusts*, 3 L. R. Ch. App. 215), or his particular assignee for value (*Carter* v. *Taggart*, 1 De G. Mac. & G. 286; and see *form of Order*, 5 De G. & Sm. 55; *In re Tubb's Estate*, 8 W. R. (V.-C. K.), 270; *Ward* v. *Yates*, 1 Drew. & Sm. 80; *Spirett* v. *Willows*, 13 W. R. (V.-C. S.), 1034, 1 L. R. Ch. App. 520), or general assignees (*Ex parte Pugh*, 1 Drew. 202; *Gent* v. *Harris*, 10 Hare, 383, 384), absolutely. The form of settlement in such cases was very fully discussed in *Spirett* v. *Willows*, 4 L. R. Ch. App. 407; and see abstract of settlement

there ordered, *Ib.* p. 411, approved of in *Croxton* v. *May*, 9 L. R. Eq. 404, 409; and *Walsh* v. *Wason*, 8 L. R. Ch. App. 482.

The fact of the husband having assigned his interest, or having become bankrupt or insolvent, or of the wife's relations being in humble circumstances, will not be considered as sufficient reasons for deviating from the general rule, so as in default of issue to give the wife a general power of appointment, or in default of appointment to settle the property, to the exclusion of the husband or his general or particular assignees, upon the next of kin of the wife: *Carter* v. *Taggart*, 1 De G. Mac. & G. 286, overruling the decision of Sir *James Parker*, V.-C., 5 De G. & Sm. 49; *Bagshaw* v. *Winter*, *Ib.* 466.

In order to avoid the expense of a settlement where the fund is small, it will be ordered to be brought into Court (*Bagshaw* v. *Winter*, 5 De G. & Sm. 468), if not there already, and the Court will direct the dividends to be paid to the wife for her separate use for life, and either declare the trusts after her death (*Ib.*, and see *Watson* v. *Marshall*, 17 Beav. 363; *Walker* v. *Drury*, 17 Beav. 484; *Wright* v. *King*, 18 Beav. 461): or give liberty to the persons entitled at her death to apply: *In re Cutler*, 14 Beav. 220, 222.

Waiver of settlement.]—If a woman wish to waive her equity to a settlement, her consent to her husband having her property must be formally taken upon her examination in Court (*Beaumont* v. *Carter*, 32 Beav. 586); or under a commission issuing from the Court (Seton on Decrees, 322, 2nd edit.); or from a competent court in a foreign state. See *Campbell* v. *French*, 3 Ves. 323.

In general, if the wife is abroad, her consent must be taken by commission: see *Tasburgh's case*, 1 V. & B. 507; *Gibbons* v. *Kibbey*, 10 W. R. (V.-C. K.), 55; *Ireland* v. *Trinbaith*, 14 W. R. (V.-C. S.), 275. However, in the case of *Minet* v. *Hyde*, 2 Bro. C. C. 663, it was ordered that the married woman should appear before some of the plaintiffs and a magistrate of Breda, to be privately examined in the French or German language, as to her consent, and the examination attested by notaries public, and translated on oath. And see *Parsons* v. *Dunne*, Belt's Suppl. to Ves. 276.

The consent of a married woman will not be taken until the amount of the fund is ascertained (*Edmunds* v. *Townshend*, 1 Anst. 93; *Jernegan* v. *Baxter*, 6 Madd. 32; *Sperling* v. *Rochfort*, 8 Ves. 180); except perhaps where it is only liable to diminution by the deduction of unascertained costs, the taxation of which has been directed: *Packer* v. *Packer*, 1 Coll. 92.

Nor will the consent be binding

upon a married woman if made under a mistake. Thus, where a married woman consented to her husband receiving the whole fund, being ignorant that the effect of his previous insolvency (of which the Court was not informed) would be to give it to his assignees, the Court ordered the whole fund to be settled. A consent given under these circumstances is not such as would have been taken, if the Court had known the facts; it would have inquired and fully explained the effect of the consent to the married woman. It is not a formal but a substantial objection; for it is the duty of the Court to explain to a married woman what she gets and loses by her consent: *Watson* v. *Marshall*, 17 Beav. 363.

The Court has power to postpone for a time the transfer to the husband, notwithstanding the consent of the wife (*Wright* v. *Rutter*, 2 Ves. jun. 673, 677; *Penfold* v. *Mould*, 4 L. R. Eq. 565), and she may retract her consent at any time before the transfer has been completed: *Penfold* v. *Mould*, 4 L. R. Eq. 562.

Neither the husband, nor his solicitor, nor any person connected with him, ought to be present at the examination: *In re Bendyshe*, 3 Jur. N. S. 727.

Where the wife waives her equity to a settlement, and consents to her husband having her property, an affidavit must be made by the husband and wife, either that there was no settlement upon their marriage, or if there was a settlement, it should be produced, and an *affidavit* made by the husband and wife that there was no other settlement, and that the settlement itself does not affect the property which the wife consents to her husband having. See *Britten* v. *Britten*, 9 Beav. 143, and note, and the forms of affidavits there given.

The Court, however, has accepted as evidence that there was no settlement on the marriage of a husband and wife resident abroad an affidavit by a solicitor disclosing facts, which made it unlikely that there was a settlement, and stating positively that he had been told by the lady and her husband that there was none. *Woodward* v. *Pratt*, 16 L. R., Eq. 127.

Where the wife is domiciled in a foreign state, upon proof that by the laws of such state her husband would be entitled to the whole of the property, without making any provision for her, the consent of the wife will not be required by the Court, and the fund will be ordered to be paid to the husband, without his being required to make any settlement upon her (*Sawyer* v. *Shute*, 1 Anst. 63; *Campbell* v. *French*, 3 Ves. 323; *Dues* v. *Smith*, Jac. 544; *Anstruther* v. *Adair*, 2 My. & K. 513; *In re Molyneux Minors*, 5 Ir. Ch. Rep. 346; *M'Cormick* v. *Garnett*, 5 De G. Mac. & G. 278);

or if the property of the wife is money to arise from the sale of land, the husband (not being an alien) electing to take it in an unconverted state may have a conveyance of it to himself in fee: see *Hitchcock* v. *Clendinen*, 12 Beav. 534, where the husband and wife were domiciled in Scotland.

But where the lady is a ward of the Court, although by the law of the country where her husband is domiciled she has no equity to a settlement, the Court will not part with funds belonging to her unless satisfied that a proper provision has been made upon her: *In re Tweedale's Settlement*, Johns. 109.

The proof of the law in foreign states in such cases being one of fact, it will not be decided by authority, but by the evidence in each case: *M'Cormick* v. *Garnett*, 5 De G. Mac. & G. 278.

Where it was sought to have funds belonging to a domiciled Scotch feme covert paid out of Court, and a Scotch settlement was in existence, the Court required the testimony of a Scotch advocate, to show that it did not affect the fund, not being satisfied with the affidavit of a gentleman describing himself as a "solicitor practising in the Supreme Courts of Scotland, Edinburgh:" *In re Todd*, 19 Beav. 582.

The consent of the wife is not requisite where the fund is under 200*l.*, but before payment it must be shown that it is not in settlement: *Elworthy* v. *Wickstead*, 1 J. & W. 69; *Hedges* v. *Clarke*, 1 De Gex & S. 354. But an affidavit as to there being no settlement, has been dispensed with where the fund to which the married woman was entitled was very small. See *Veal* v. *Veal*, 4 L. R. Eq. 115, where it was only ten pounds.

In Ireland, it seems money in Court belonging to the wife, not exceeding 100*l.*, may be paid to her husband without her consent: *In re Surridge's Trusts*, 17 I. Ch. 163.

It was at one time thought that the wife was not entitled to a settlement, where the fund was under 200*l.* (*Foden* v. *Finney*, 4 Russ. 128); it has, however, been held by Sir *John Romilly*, M. R., that the wife, although her consent may not be requisite before payment of a sum under that amount to her husband, is as much entitled to a settlement out of a small as out of a large sum. See *Re Cutler*, 14 Beav. 220; which case has been followed by Sir *R. T. Kindersley*, V.-C.; see *In re Kincaid*, 1 Drew. 326.

Except in some cases under Malins' Act (20 & 21 Vict. c. 57), a married woman cannot waive her right to take her reversionary personal property by survivorship (*Osborn* v. *Morgan*, 9 Hare, 432, 434, and see *In re Godfrey's Trusts*, 1 I. R. Eq. 531): whether it might possibly vest in possession

during the coverture, or could only vest after the husband's death: *Box* v. *Box*, 2 C. & L. 605; *Box* v. *Jackson*, Dru. Ca. t. Sugd. 42; where all the authorities on the subject are reviewed.

An infant feme covert cannot give her consent. See *Stubbs* v. *Sargon*, 2 Beav. 596; *Abraham* v. *Newcombe*, 12 Sim. 566, overruling *Gullin* v. *Gullin*, 7 Sim. 236.

A female ward of the Court, married without its authority, or in contempt of it, will not be allowed to waive her right to a settlement out of her own property (*Stackpole* v. *Beaumont*, 3 Ves. 89); and the settlement will in general be much less in favour of the husband than in ordinary cases, as the Court will attend principally to the interest of the wife, and her children by that or any subsequent marriage (*Stevens* v. *Savage*, 1 Ves. jun. 154; *Chassaing* v. *Parsonage*, 5 Ves. 15; *Millet* v. *Rowse*, 7 Ves. 419; *Bathurst* v. *Murray*, 8 Ves. 74; *Wells* v. *Price*, 5 Ves. 398; *Winch* v. *James*, 4 Ves. 386; *Priestly* v. *Lamb*, 6 Ves. 421; *Halsey* v. *Halsey*, 9 Ves. 471; *Pearce* v. *Crutchfield*, 16 Ves. 48; *In re Healey*, 1 C. & L. 393; *In re Anne Walker*, L. & G. t. Sugd. 325; *Hodgens* v. *Hodgens*, 11 Bligh, N. S. 62; 4 C. & F. 323; *Birkett* v. *Hibbert*, 3 My. & K. 227); especially when a man of no fortune marries a ward without the leave of the Court, with the sole object of getting possession of her property. See *Like* v. *Beresford*, 3 Ves. 506; *Ball* v. *Coutts*, 1 V. & B. 303.

In a recent case, however, a ward of the Court, who married without its leave, though with the consent of her guardian, was allowed, on coming of age, to consent to her husband having her property without his making a settlement on her: *Bennett* v. *Biddles*, 10 Jur. 534.

But the Court has no power over the property of an infant not being a ward of the Court, either under its general jurisdiction, or under the Infants' Settlement Act (18 & 19 Vict. c. 43). *In re Potter*, 7 L. R. Eq. 484.

What will defeat or bar the wife's equity to a settlement.]—The receipt by the husband or his assignees of the rents and profits, or a transfer of the fund, will defeat the wife's right to a settlement; and, as laid down by Lord *Eldon*, in the principal case, "previously to a bill, a trustee, who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband, but not if the bill has been filed; and if the husband or those claiming under him, can obtain the property of the wife by an action at law, equity will not by injunction prevent them from doing so." See also *Milner* v. *Wilmer*, 2 P. Wms. 641; *Jewson* v. *Moulson*, 2 Atk. 420: *Allday*

v. *Fletcher*, 1 De G. & Jo. 82. *Re Swan*, 2 Hem. & M. 34, 37. But after a bill has been filed, trustees could not safely make any payments to the husband: *Macaulay* v. *Philips*, 4 Ves. 18; *De la Garde* v. *Lempriere*, 6 Beav. 344, 347.

Where a married woman who, prior to her marriage, was entitled under a will to a debt, payable after the death of her sister, secured on land by a deposit of title deeds, by deed acknowledged, joined her husband in assigning her share and interest in the said debt, and the said real security, in order to secure monies due by her husband, it was held by Sir *J. Stuart*, V.-C., in a suit to administer the testator's estate, that she was not entitled to a settlement out of the proceeds of the real estate. *Cooke* v. *Williams*, 11 W. R. (V.-C. S.) 504.

But injunctions, in many instances, have been granted to restrain the husband from proceeding in the Ecclesiastical Court for a legacy due to his wife, until he had agreed to make a reasonable provision for her: *Jewson* v. *Moulson*, 2 Atk. 420; *Gardner* v. *Walker*, 1 Stra. 503; *Elibank* v. *Montolieu*, 10 Ves. 90.

Where a woman at the time of her marriage owes more than the whole amount of her property, she will have no equity to a settlement out of it. See *Bonner* v. *Bonner*, 17 Beav. 86. In that case a married woman was indebted previous to her marriage, and the debt was proved under the husband's bankruptcy, the debt being greater than the fund, it was held that she was not entitled to a settlement, but that the whole fund should be paid to the assignees.

But if the value of her property exceeds the amount of the debts she owed before marriage, she may be held entitled to a settlement out of the property, after provision has been made for payment of the debts. See *Barnard* v. *Ford*, 4 L. R. Ch. App. 247, where there was a declaration in this form: "That Mrs. Barnard is entitled to no settlement until after provision is made from her property of an amount equal to the debts owing from her at the date of her marriage, which shall, previously to the Chief Clerk's certificate, be proved under her husband's bankruptcy; an inquiry as to her debts and property; and then an inquiry, whether Mrs. Barnard is entitled to any settlement, having regard to the above declaration."

The wife's equity to a settlement will be barred by an adequate settlement having been made upon her, but not by an inadequate settlement, unless it be by an express stipulation before marriage. (*Salwey* v. *Salwey*, Amb. 692; *Garforth* v. *Bradley*, 2 Ves. 675; *Spirett* v. *Willows*, 5 Giff. 49; 1 L. R. Ch. App. 520.) And in a recent case, where an ade-

quate settlement had been made upon the wife, the husband was held to be entitled to the whole fund, although he was living apart from his wife, they having separated by mutual consent and agreement, and no blame being imputed to one party more than the other (*In re Erskine's Trusts*, 1 K. & J. 302; *Spicer* v. *Spicer*, 24 Beav. 365). And it is not essential that the settlement shall have been made by the husband: *Giacometti* v. *Prodgers*, 8 L. R. Ch. App. 338.

A married woman may, by fraud, preclude herself from claiming her equity to a settlement. See *In re Lush's Trusts*, 4 L. R. Ch. App. 591. There, a woman, two months *after* her marriage, wrote and signed in her maiden name a paper dated before the marriage, and purporting to give to her husband, in consideration of the marriage, her reversionary interest in a trust fund. She signed this paper for the purpose of enabling him to borrow money on her reversionary interest; he threatening that, if she did not sign it, he would send her back to her relations, with whom she was on bad terms. The husband sold the reversionary interest; and part of the purchase-money was paid to the wife. Shortly before the completion, which took place on the 14th of October, 1858, the husband being at the time in prison for debt, she signed and gave to the purchaser's solicitor a letter, dated the 11th of October, 1858, addressed to one of the trustees of the fund, stating that she had *before* her marriage assigned her interest in the trust fund to her husband. Upon the reversion falling into possession by the death of the tenant for life, she claimed her equity to a settlement on the ground that the paper signed after marriage did not bind her. No fraud on the part of the purchasers was suggested, nor does there appear to have been any negligence on their part equivalent to fraud. It was held by the Lords Justices of the Court of Appeal, reversing the decision of Lord *Romilly*, M. R., that as the woman had been guilty of a fraud, she was prevented claiming her equity to a settlement against the purchaser. "The parties," said Lord Justice *Selwyn*, "who were about to advance the money, and who did advance it three days after the date of the letter of the 11th of October, 1858, were entitled to believe the representations made by her in that letter; and I think she cannot now be heard to say that they ought to have disbelieved those representations. I think it would be contrary to equity and good conscience to allow a lady who had made under such circumstance a declaration so clear and distinct as that, to set up afterwards a claim to an equity to a settlement, so as to defeat the interests of the purchasers, who,

upon the faith of that representation, have paid the purchase-money in respect of her interest."

If the wife be living in adultery, apart from her husband, she cannot, except under very peculiar circumstances (*In re Lewin's Trust*, 20 Beav. 378), insist upon her equity to a settlement (*Carr* v. *Eastabrooke*, 4 Ves. 146); but even then it seems the husband will not be allowed to receive the whole of her property, while he does not maintain her. See *Ball* v. *Montgomery*, 2 Ves. jun. 191, in which case Lord *Loughborough* ordered the future dividends of the fund to be paid into Court, subject to further order; observing that the wife's delinquency was a good ground for not paying it to her, but was not a ground for letting the husband receive the whole of the property, which, being hers originally, was intended to be his, partly to support her.

Where both husband and wife are living in adultery, it has been held that the wife may claim a settlement: *Greedy* v. *Lavender*, 13 Beav. 62.

A female ward of Court, married without its consent, will not be barred from her claim to a settlement, although she should be living in adultery: *Ball* v. *Coutts*, 1 V. & B. 302, 304; *In re Anne Walker*, L. & G. t. Sugd. 299.

Wife, when allowed maintenance by Court out of her equitable property.]—If the husband refuse to make a settlement upon his wife, the Court will not go so far as to do anything in diminution of his legal rights, so as to take away the produce of his wife's property from him, or prevent his receiving the interest, so long as he is willing to live with and to maintain her, and there is no reason for their being apart. The Court, however, will retain the capital, so as to give the wife a chance of taking it by surviving her husband: *Sleech* v. *Thorrington*, 2 Ves. 562. And see *Oxenden* v. *Oxenden*, 2 Ves. 493; *Williams* v. *Callow*, 2 Vern. 751.

This course it seems will be adopted where a husband and wife are entitled to a fund as tenants by entireties: see *Atcheson* v. *Atcheson*, 11 Beav. 485, where a husband and wife being entitled to a legacy as tenants by entireties, the wife claimed a settlement out of the *whole* fund, the husband claimed that a moiety ought to be paid to him, Lord *Langdale*, M. R. ordered the legacy to be carried over to the joint account of the husband and wife; with a direction to pay the dividends to the husband during their joint lives, with liberty, on the death of either, for the survivor to apply. "The joint interest," said his Lordship, "given to husband and wife in this way, or the joint tenancy between them, if it can be so called, is so modified by the unity of the persons in law,—the consequent rights of the husband and wife

by entireties, and the contingent right of the survivor to the whole, if not previously disposed of by the husband,—that it does not appear to me to be subject to the ordinary incidents of joint-tenancy. And, it not being ascertainable what belongs to the wife separately, or what the husband is entitled to in her right, I am unable to decide out of what portion of the legacy a settlement can be made upon her, according to the rules of this Court." And see *Attorney-General* v. *Bacchus*, 9 Price, 30; 11 Price, 547. But it seems that, if a fund, to which the husband and wife are entitled as tenants by entireties, as in the case of the legacy in *Atcheson* v. *Atcheson*, be not brought under the consideration of the Court, payment to the husband, in the lifetime of the wife, would be a good payment. Per Lord *Langdale*, M. R., in *Atcheson* v. *Atcheson*, 11 Beav. 491: and see *Grute* v. *Locroft*, Cro. Eliz. 287.

Where the husband was a lunatic, not found so by inquisition, and the fund was small, the dividends were ordered to be paid to the wife: *Stead* v. *Calley*, 2 My. & K. 52.

In *Bond* v. *Simmonds*, 3 Atk. 21, Lord *Hardwicke* went so far as to say, that, where a husband has received a good part of the wife's portion, and only a small part remains, and the husband is so perverse that he will not make a competent settlement on the wife, the Court will not only stop the payment of the residue of her fortune to the husband, but will even prevent his receiving the interest of that residue, that it may accumulate for the benefit of the wife, unless he is starving for want of maintenance.

Where, however, the husband deserts the wife, and leaves her unprovided for, the Court will direct the payment of the interest of the wife's property to her, until the husband returns and maintains her as he ought to do: *Watkins* v. *Watkins*, 2 Atk. 96; *Sleech* v. *Thorrington*, 2 Ves. 562; *Peters* v. *Grote*, 7 Sim. 238; *Rishton* v. *Cobb*, 9 Sim. 620.

It has been before shown, that, according to the decisions of the Court, although a married woman, as against the assignees of her husband in bankruptcy or insolvency, is entitled to have a settlement or maintenance out of her equitable property, in which she has *only a life* interest (*Lumb* v. *Milnes*, 5 Ves. 517; *Brown* v. *Clark*, 3 Ves. 166; *Jacobs* v. *Amyatt*, 1 Madd. 376, n.; *Sturgis* v. *Champneys*, 5 My. & Cr. 97; *Vaughan* v. *Buck*, 13 Sim. 404; *Kocber* v. *Sturgis*, 22 Beav. 588; *Squires* v. *Ashford*, 23 Beav. 132), she, nevertheless, cannot claim either, as against the legal right of her husband, not being bankrupt or insolvent, although he may be in difficulties, (for the husband is entitled to the wife's

income as long as he maintains her to the best of his ability, and they are living together): *Vaughan* v. *Buck*, 13 Sim. 404. Nor can she claim a settlement or maintenance out of the income of her equitable property, as against the particular assignee for value of her husband, although subsequently to the assignment he may become bankrupt or insolvent, or desert and leave her utterly destitute (*Tidd* v. *Lister*, 3 De Gex, Mac. & G. 857, ante, p. 498); but if the husband deserts the wife, leaving her unprovided for, the Court will allow her past and future maintenance out of the income of her life interest in equitable property, not specifically assigned by the husband for value: *Wright* v. *Morley*, 11 Ves. 12, 23; *Gilchrist* v. *Cator*, 1 De Gex & Sm. 188; *Allerton* v. *Knowell*, cited 4 Ves. 799; *S. C.*, nom. *Atherton* v. *Knowell*, 1 Cox, 229; *Coster* v. *Coster*, 1 Keen, 199. And where a person made pecuniary advances to a married woman, deserted by her husband, on the credit of a fund in Court—her property, for her maintenance, exceeding the amount of the income, he was reimbursed out of the capital: *Guy* v. *Pearkes*, 18 Ves. 195; and see *Re Ford*, 32 Beav. 621.

And a husband who has deserted his wife and ceased to maintain her, although he received the income of her property vested in trustees, has been compelled in equity personally to repay the person who advanced moneys to her for, and which were actually applied by her in the purchase of, necessaries. *Deare* v. *Soutten*, 9 L. R. Eq. 151; *Jenner* v. *Morris*, 1 Dr. & Sm. 218; 3 De G. F. & J. 45, overruling *May* v. *Skey*, 16 Sim. 588; and see *Harris* v. *Lee*, 1 P. Wms. 482; *Hutchinson* v. *Standley*, 9 L. R. Eq. 152, cited.

And the Court will not allow the right of a wife for maintenance to be defeated by her husband making a fraudulent conveyance of her property to trustees for payment of his debts; *Colmer* v. *Colmer*, Mos. 113, 118.

In order to favour as far as possible all efforts towards reconciliation on the husband's part, notwithstanding a decree has been made allowing the wife a separate maintenance, upon his consenting to cohabit with her, and promising to use her kindly, the Court has refused to continue the separate maintenance; per Lord *Hardwicke* in *Head* v. *Head*, 3 Atk. 296; and see *Gilchrist* v. *Cator*, 1 De G. & Sm. 188.

A woman cannot represent herself as deserted when her husband leaves her in the course of his duty, and she refuses to accompany him. See *Bullock* v. *Menzies*, 4 Ves. 798, in which case the husband was an officer in a marching regiment.

However, when the cruelty or improper conduct of the husband renders her leaving him neces-

sary or justifiable, and there is no impropriety on her part, the Court will hold her entitled to maintenance or a settlement. See *Oxenden* v. *Oxenden*, 2 Vern. 493; *Williams* v. *Callow*, 2 Vern. 752; *Atherton* v. *Nowell*, 1 Cox, 229; *Eedes* v. *Eedes*, 11 Sim. 569. And where the husband has so conducted himself that the wife cannot live with him, as, for instance, where she has obtained against him a divorce upon the ground of cruelty and adultery, especially if it appears that he married her from merely interested motives, and is not maintaining her, the Court may give to the wife the income of the whole of her property, although the husband may have received nothing from her on her marriage: *Barrow* v. *Barrow*, 5 De G. Mac. & G. 782.

But the Court will not give the wife maintenance out of property given to her for life, if she has already an adequate provision for her separate use, although the husband had taken the benefit of the Insolvent Debtors' Act. *Aguilar* v. *Aguilar*, 5 Madd. 414.

Where the wife has eloped and lives in adultery, she will not be allowed maintenance out of the income of property to which she is entitled for life: see *Ball* v. *Montgomery*, 2 Ves. jun. 191, where Lord *Loughborough* said, "that it would be enormous to give it to enable her to keep the gallant, instead of his keeping her;" but in the same case his Lordship refused to let the husband have the income, observing, "the delinquency of the wife is a good ground for not paying it to her, but is not a ground for me to let him receive the whole of this property, which, being hers originally, was intended to be his *partly to support her*. I cannot let her have it, nor the husband, as then she would be left unprovided for. See the consequence of it: from her past and still subsisting misconduct, I must continue her in a state of adultery or reduce her to beggary. I cannot suppose he is to take her back. *Alexander* v. *M'Culloch* (cited 2 Ves. jun. 192) is, as far as I have heard it, a very good rule to go by. The situation of the case will probably produce some agreement for her future support."

Where, however, the husband is by express contract entitled to an interest during their joint lives in the property of his wife, and he is obliged to separate himself from her in consequence of her misconduct, his rights will not be thereby affected. Thus, in *Duncan* v. *Campbell*, 12 Sim. 616, 4000*l.* was by deed vested in trustees, to pay the interest thereof to the husband and *wife during their joint lives*, and to stand possessed of the principal for the survivor of them. The husband afterwards separated from his wife in consequence of her having

committed adultery. It was held by Sir *L. Shadwell*, V.-C., that under the words of the "deed the husband was entitled to receive the whole of the income, and that he could not be deprived of the benefit which he was entitled to under the deed, because his wife had so misconducted herself that he was justified in living separate from her."

How far settlements made in consideration of the wife's equity to a settlement will be binding as against creditors.]—It is clear that where the Court directs a settlement to be made upon the wife, "the Court will support it as a good settlement, for valuable consideration." See *Wheeler* v. *Caryl*, Amb. 121; *Simson* v. *Jones*, 2 Russ. & My. 365.

The Court, moreover, has gone further; if after marriage, the wife being entitled to such a portion which the husband cannot touch without the aid of the Court, and the trustees will not pay it without the husband making a settlement; if the husband does agree to it, and do that which the Court would decree, it is a good settlement as against his creditors. Per Lord *Hardwicke*, C., in *Wheeler* v. *Caryl*, Amb. 121, 122. So, likewise, in *Moor* v. *Rycault*, Prec. Ch. 22, the trustees in whom the portion of a married woman was vested refused to part with it unless the husband would give security that it should be settled for the benefit of his wife, and it was accordingly agreed that it should be laid out in land to be settled upon the husband and wife, and the heirs of their bodies. A bill was afterwards filed by a creditor of the husband to set aside the settlement, upon the ground that it was voluntary, as being made after marriage, and in fraud of creditors. "But the Court would do nothing in it, for that if the husband had exhibited a bill against the trustees for the portion, the Court would not have decreed it to him, without making some such settlement." So a legacy due to a married woman may, with the consent of her husband, be paid to the trustees of a settlement already in existence, upon trusts under which the life interest of the husband is determinable on alienation or incumbrance thereof. See *Montefiore* v. *Behrens*, 1 L. R. Eq. 171. See also *Middlecome* v. *Marlow*, 2 Atk. 519; *In re Wray's Trusts*, 16 Jur. 1126.

Even if trustees in possession of the property of a married woman should, on the mere request of her husband, transfer it to new trustees upon trust for her separate use, such trust will be good as against his creditors: *Ryland* v. *Smith*, 1 My. & Cr. 53.

But if the husband has once reduced into possession the equitable choses in action of his wife, any subsequent settlement of them would not be valid as against

his creditors. See *Ryland* v. *Smith*, 1 My. & Cr. 53; there a married woman being entitled under a will to stock and to cash, forming part of a residue, her husband wrote to one of the executors, requesting that the *stock* should be transferred into the names of certain trustees for the wife's separate use, and that the cash should be paid to himself. These requests were complied with. The husband employed part of the *cash in increasing the amount of the stock*. He afterwards became bankrupt and died. It was held by Sir *C. C. Pepys*, M. R., that the stock transferred by the executors was not reduced into possession by the husband, and therefore belonged to the wife by survivorship; but that the assignees under the bankruptcy were entitled to the increase made by the husband. "It is said," observed his Honor, "on behalf of the assignees, that the transfers having been made with the assent and direction of the husband, amount in law to a reduction into possession by him. If this were so generally, it would be impossible for persons holding money in trust for a married woman to make a settlement of it upon her with the consent of the husband, without coming to a Court of equity for that purpose.

"The question of right cannot depend upon whether there was a more or less ready assent by the husband, or upon any speculation as to whether the executors would or would not have paid the whole to him if he had demanded it. This would be impossible to ascertain, and it would be too dangerous to make the rights of parties depend upon what they might afterwards say upon that subject. The directing or consenting to an investment consistent with the wife's equities, cannot be considered as an act destroying such equities by being a reduction into possession; but it was argued to that extent, and that the wife therefore had lost the benefit even of a settlement out of those funds; and it was necessary to argue the case to that extent, because if the acts do not amount to a reduction into possession, the right of survivorship accrues, as the assignee cannot stand in a better situation than the husband, the bankrupt." After referring to *Wall* v. *Tomlinson*, 16 Ves. 413, and *Glaister* v. *Hewer*, 8 Ves. 207, his Honor said that for these reasons, and upon these authorities, he was of opinion that the widow was absolutely entitled to the whole of the funds in question, except that part which was purchased with the sum paid to the husband without any condition. . . . That small sum belonged to the bankrupt's estate, as it had been reduced into possession, and invested without consideration in the names of the trustees for the wife's benefit.

HULME *v.* TENANT.

30*th June.* 28*th July.* 14*th December,* 1778.

[REPORTED 1 BRO. C. C. 16.]

S. C., 2 Dick. 560, Reg. Lib. 1778. A fol. 90.

WIFE'S SEPARATE PROPERTY.]—*Bond of a feme covert, jointly with her husband, shall bind her separate property.*

THE bill was filed by the obligee of a bond, to secure 180*l.* entered into by the defendants, husband and wife, against the husband, wife, and her surviving trustee, to recover the sums secured out of the wife's separate estate.

Upon the marriage, the estates of the wife had been conveyed to trustees; one part, consisting of freehold and leasehold lands, in trust to *receive and pay the rents and profits to the wife for her separate use*, and to convey the estate itself to such use as she, by her last will in writing, or by deed or writing under her hand and seal, executed in the presence of two witnesses, should appoint; in default of appointment, to the use and behoof of her heirs and assigns; other parts to be sold, and out of the produce, 1000*l.* to be laid out according to the directions of the wife, the interest and profits to be paid to her, and the principal *to her, or her order, by note or writing under her hand;* and for want of such appointment, to her executors, administrators, and assigns.

This 1000*l.* had been raised, and the whole, or the greatest part applied, so that the question in the cause was with respect to the remedy against the other estate.

In 1769, the husband borrowed of the plaintiff, Mrs. Hulme, 50*l.*, upon his and his wife's bond. In 1770, having occasion for a further sum, the wife herself applied to the plaintiff, and borrowed 130*l.*, paid the interest due upon the former sum of 50*l.*, and [the husband and wife] gave a new bond for the 180*l.*

The cause had been heard before Lord *Bathurst*, who dismissed the bill. It came on now to be re-heard.

Mr. *Mansfield* opened for the plaintiff, but the reporter was absent.

(*a*) *Wedderburne.*

Mr. *Attorney-General* (*a*) for the defendants.—The plaintiff is not entitled to the relief of a court of equity, but is to be left to make the best she can of the security at law. Trustees for a woman are appointed for the purpose of preventing her from doing acts prejudicial to herself, under the influence of her husband. The husband's credit not being good, the plaintiff has taken the wife's bond. The husband was indebted. He and his wife are co-obligors, and it is done with the approbation of the plaintiff's attorney, who must know it was void. He ought to have insisted upon a mortgage of her separate property. This Court will never look upon bonds as appointments where the party could not enter into the bond. In many cases of bonds with penalties, the Court considers the bond as the form only, and as evidence of the substance, and will not suffer the party to be free upon payment of the penalty; but in the case of an infant, where it is voidable only, the taking of the bond will not aid the taker in equity. I do not contend that a married woman cannot contract in respect of her separate property, but the party contracting must take a security agreeable to the nature of the property; he cannot better his security. *Peacock* v. *Monk*, 2 Ves. 190 (*b*), closes with a dictum, the authority of which is very doubtful; it had no affinity to the principal question.

(*b*) See Belt's Suppl. 342.

Mr. *Selwyn*, on the same side.—There is no case where the point has been determined that a bond, in which the wife joins her husband, binds her separate property. *Norton* v. *Turvill*, 2 P. Wms. 144 (*c*), was against the wife's representatives, which is very different from the present against the separate property settled upon her for life.

(*c*) 2 Eq. Ca. Ab. 152, pl. 14.

[*Lord Chancellor Thurlow.*—*Grigby* v. *Cox*, 1 Ves. 517, appears to be a decree for a specific performance. The

defect of that case is, that it does not state the trust. It is said that a feme covert is to be considered as a feme sole, with respect to every authority she can exercise over her separate estate; but it is different where the consent of the trustees is made essential to the conveyance, although the mere appointment of trustees is not sufficient to deprive her of that authority; for there must be trustees (*a*), otherwise she could have no separate property.]

(*a*) Trustees are not essentially necessary for the creation of a trust for the separate use of a married woman, as the husband will be converted into a trustee for her. See *Bennet* v. *Davis*, 2 P. Wms. 316; *Parker* v. *Brook*, 9 Ves. 583; *Rich* v. *Cockell*, 9 Ves. 369.

Mr. *Selwyn*.—In *Biscoe* v. *Kennedy* (*b*), Sir *Thomas Clarke* thought it was to be considered as the property of a feme sole; but, in that case, the bond was given before the marriage of the parties.

[*Lord Chancellor Thurlow*.—Do you consider that case as deciding that her property was liable to her acts only while she was a feme sole?]

Mr. *Selwyn*.—A feme covert can execute no act except by virtue of a power, or with the consent of the trustees, or by some means referring to her separate property; but, in this case, there is no reference whatsoever to her separate property, or consent of trustees. It is not wholly immaterial that the plaintiff has sued at law. In *Machorro* v. *Stonehouse*, in July last, upon marriage a sum was agreed to be laid out in the funds, upon trust that the dividends should be to the separate use of the wife;

(*b*) *Biscoe* v. *Kennedy*, at the Rolls, 21st July 1762. The defendant, Jane Kennedy, then the widow of Ormond Tomson, Esq., being indebted to the plaintiff Biscoe, in £114 by bond 22nd of April, 1755, and being possessed of several leasehold houses, and of £1000 East India Stock, by settlement on her marriage with the defendant James Kennedy, all her personal estate (excepting £500 East India Stock, which the husband was to have) was conveyed to the defendant McCullock, in trust for the separate use of the defendant Jane. The marriage having taken effect, the plaintiff filed his bill (without having sued the husband) to have the separate estate of the wife applied to the payment of the debt; which bill was dismissed. The plaintiff then sued out writs against James and Jane Kennedy; but James Kennedy absconding, could not be served, and the plaintiff proceeded to outlawry, and then filed this bill, to be paid out of the wife's separate estate. The defendant insisted, that during her husband's life, her separate property was not liable to this debt, contracted by her while sole. The plaintiff contended that the settlement as to him was fraudulent. Upon the hearing his Honor declared, that upon the circumstances of the case, the effects of the defendant, vested in her trustee, were to be considered as the property of a feme sole, and ordered the plaintiff's debt and costs to be paid out of the £500 East India Stock, in the hands of the trustee. Cur. Declare that under the circumstances of this case, the effects of the defendant James Kennedy, vested in the defendant McCullock, are to be considered as the property of a feme sole, and as such liable in equity to make the plaintiff satisfaction for so much of the debt contracted by her while feme sole, as he has not been able to recover by means of the outlawry of James Kennedy her husband.

Account of what remains due to the plaintiff, and tax his costs of suit, direct payment of debt and costs by sale of the East India Stock (comprised in the settlement) standing in the names of the defendant Jane Kennedy and defendant McCullock, and liberty to apply. Reg. Lib. 1761, A., p. 517; 9 L. R. Eq. 562.

the plaintiff bought the interest during the lives of the husband and wife, for eight years' purchase: there was no fraud. A bill was brought against the trustee for a transfer. Mrs. Stonehouse, in her answer, insisted this was against her consent, but there was evidence in the cause that they both had consented. The bill, so circumstanced, was dismissed with costs, by his Honor (Sir *Thomas Sewell*), who seemed shocked at the proposition that a married woman could be bound by an act done in conjunction with her husband (*a*).

(*a*) Sed vide contra, *Stanford* v. *Marshall*, 2 Atk. 68; *Pybus* v. *Smith*, 3 Bro. C. C. 340.

Mr. *Mansfield*, in reply.—It is now laid down that a woman, having separate property, cannot dispose of it but by the means pointed out by the settlement, and with the consent of her trustees. It seemed to me that a feme covert, having separate property, was to that intent (*b*) a feme sole, and might borrow money and give securities. The consent of the trustees has been decided not to be necessary; the use of trustees being only to guard it against the husband. Here, it is to such uses as she, by deed or will, should appoint. Mr. *Attorney-General* and Mr. *Selwyn* argue upon the ground that the bond was void; that is begging the question. If we are right, though void at law, it is not void here. The latter of these two bonds, that to secure 180*l.*, was given on the mere motion of the wife; no objection arises from the plaintiff's having sued at law: it was a legal security against the husband. As to an infant's bond: an infant is never considered here as an adult, but a feme covert is very often considered as a feme sole. In *Norton* v. *Turvill*, the assets were considered as being bound when she was dead; then her property must have been bound whilst she was living. That case is decisive of the present question. The dictum in *Peacock* v. *Monk* is mentioned as falling from Lord *Hardwicke*, and naturally, as being the general rule governing the property of women, and taking that particular case out of the rule. In *Biscoe* v. *Kennedy*, the separate property could not be the subject in dispute, the debts of a feme sole falling on her husband. In *Machorro* v. *Stonehouse*, the woman lived

(*b*) Qy. extent.

separate from the husband, and probably some fraud struck the learned judge.

Lord Chancellor Thurlow.—My doubt arises principally upon the form of the relief, rather than the principles upon which the bill is brought; it is a bill brought by the obligee upon a joint bond by husband and wife for 180*l.* to recover that sum out of the separate property of the wife. It is brought against the wife, the husband, and the trustees, for attaining the most extensive and perfect relief which the situation of her separate property will enable her or her trustees to afford.

The question is, what sort of execution this Court will award against that separate property? It is created by deed, and is real estate conveyed to trustees, as to a considerable part of it, in trust to receive and pay the rents to the wife, and to convey the estates themselves according to the appointment of the wife, by her last will and testament in writing, or by deed or writing under her hand and seal, executed in the presence of two or more witnesses; and, for want of such declaration or appointment, to the use and behoof of the wife, her heirs and assigns; as to other parts, in trust, to be sold, and out of the produce of the sale, 1000*l.* to be retained by the trustees, to be laid out according to the directions of the wife, the profits to be paid to her, and the principal to her or her order, by note or writing under her hand; and, for want of such appointment, to her executors, administrators, and assigns.

The rule laid down in *Peacock* v. *Monk*, 2 Ves. 190, *that a feme covert acting with respect to her separate property, is competent to act in all respects as if she was a feme sole*, is the proper rule, and necessary to support the decisions on this subject. The consequence was that, in *Allen* v. *Papworth*, 1 Ves. 163 (*a*), where a bill was brought by husband and wife for an account, the wife, together with her husband, submitting that the profits of her separate estate should be applied to pay the husband's debts, she was bound by that submission, and the profits of her separate

(*a*) See a fuller and more correct statement of the case in Belt's Suppl. p. 91.

estate were by decree directed to be so applied. In *Grigby* v. *Cox*, 1 Ves. 517, where the wife had contracted to sell her separate estate, being authorized by settlement to dispose of it, the Court bound her, as a person equally competent as if sole, to a specific performance of that contract: I take it, therefore, it is impossible to say but *that a feme covert is competent to act as a feme sole, with respect to her separate property, where settled to her separate use.*

But the question here goes a little beyond that; it is not only how far she may act upon her separate property: I have no doubt about that; but *the question is, how far her general personal engagements shall be executed out of her separate property.* If she had by instrument contracted that this or that portion of her separate estate, should be disposed of in this or that way, I think she and her trustees might have been decreed to make that disposition; but if she enters into an engagement, which would make a feme sole liable to the whole extent of the contract as to her person, &c., in every respect, it is clear such general engagement, entered into by a feme covert, will not bind her as such. It is not like the case of an infant, who is incapable of acting; but in respect to a feme covert, determined cases seem to go thus far, *that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustee shall be obliged to apply personal estate, and rents and profits when they arise, to the satisfaction of such general engagement; but this Court has not used any direct process against the separate estate of the wife, and the manner of coming at the separate property of the wife has been by decree to bind the trustees, as to personal estate in their hands, or rents and profits, according to the exigencies of justice, or of the engagement of the wife, to be carried into execution* (*a*). I know of no case which has gone further than that. Suppose the wife to have power, by settlement, to dispose of her real estate to any uses she shall think fit, yet the trustees must make the formal instrument, without which the estate cannot pass. I know of no case where the general engagement of the wife has

(*a*) See also *Francis* v. *Wigzell*, 1 Madd. 258; *Aylett* v. *Ashton*, 1 My. & Cr. 105, 112.

been carried to the extent of decreeing that the trustees of her real estate shall make conveyance of that real estate, and by sale, mortgage, or otherwise, raise the money to satisfy that general engagement on the part of the wife. It may be difficult to give relief here without doing something of that kind, because that part of the real estate which was to be sold has been sold, and the money has been applied, with the direction of the wife, by the hand of the trustee, who consequently is no longer liable as to that sum; so that so far as the 1000*l.*, it seems out of the reach of this Court, the trustee alleging that the money is paid, or not remaining in his hands. —[Mr. *Ambler*.—Only part paid over.]—I believe there is no instance of a personal decree against a feme covert, for payment of any sum whatever. Though her separate personal property is liable, yet the decree is to fetch forth her separate estate, and make it liable to her engagement. No lease found in the hands of the trustee is now before the Court; we cannot come at it. As a bond it is void, otherwise an extent might have gone.

July 28th, 1778.

Lord Chancellor Thurlow.—I have no doubt about this principle, that, *if a Court of equity says a feme covert may have a separate estate, the Court will bind her to the whole extent as to making that estate liable to her own engagements; as, for instance, for payment of debts, &c.* But, although the remedy here is more extensive than in a court of law, I do not find the Court has ever ordered a power to be executed; it has industriously stopped short of so doing, and has only given a remedy by stopping the fund, where the power was executed; therefore, I cannot order the feme covert to execute her power, but I am exceedingly clear that the leasehold estate will be liable.

It stood referred to the Master (*a*) to take an account of the rents and profits of the leasehold estates; but, before any report, the parties came to a compromise, upon the defendant Frances paying the principal sum borrowed, with interest, without any costs (*b*).

(*a*) See order made by Lord Thurlow C., extracted from the Registrar's Book in note to *Johnson* v. *Gallagher*, 3 De G. F. & Jo., p. 502. (*e*).

(*b*) See *Standford* v. *Marshall*, 2 Atk. 68; *Sockett* v. *Wray*, 4 Bro. C. C. 483.

"That at law," observes Lord *Brougham*, C., "a feme covert cannot in any way be sued, even for necessaries, is certain. Bind herself, or her husband, by specialty, she cannot; and, although living with him, and not allowed necessaries, or apart from him, whether on an insufficient allowance or an unpaid allowance, she may so far bind him that those who furnish her with articles of subsistence may sue him; yet, even in respect of these, she herself is free from all suit. This is her position of disability, or immunity at law; and this is now clearly settled. Her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is no more recognised than is the cestui que trust or the mortgagor, the legal estate, which is the only interest the law recognises, being in others.

"But, in equity, the case is wholly different. Her separate existence, both as regards her liabilities and her rights, is here abundantly acknowledged; not, indeed, that her person can be made liable, but her property may, and it may be reached through a suit instituted against herself and trustees. It may be added that the current of decision has generally run in favour of such recognition. The principle has been supposed to be carried further in *Hulme* v. *Tenant*, than it had ever been before, because there a bond, in which the husband and wife joined, and which, indeed, so far as the obligation of the wife was concerned, was absolutely void at law, was allowed to charge the wife's estate vested in trustees to her separate use, though such estate could only be reached by implication; and though, till then, the better opinion seemed to be, that the wife could only bind her separate estate by a direct charge upon it. Lord *Eldon* repeatedly expressed his doubts as to this case; but it has been constantly acted upon by other judges, and never, in decision, departed from by himself: *Murray* v. *Barlee*, 3 My. & K. 220, 222."

Equity has long recognised the separate existence of a married woman as regards property given or settled to her separate use, and it will be hereafter seen that the legislature has by the Married Woman's Property Act, 1870 (33 & 34 Vict. c. 93) in many cases attached the separate use to property coming to married women.

Wife's power of disposition over property given or settled to her separate use absolutely.] The rule laid down in *Peacock* v. *Monk*, that a feme covert, *acting with respect to separate property, is competent to act in all respects as a feme sole*, is said by Lord *Thurlow*, in the principal case, *ante* p. 525, to be the proper rule, and necessary to support the decisions on this subject.

Thus, it has been established, ever since the case of *Fettiplace*

v. *Gorges*, 1 Ves. jun. 46; *S. C.*, 3 Bro. C. C. 8, that *personal* property settled upon a feme covert for her separate use, is to be enjoyed with all its incidents; and that, as the jus disponendi is one of them, she may, although there is no express power of disposition given to her, dispose of it, either by acts inter vivos, or by will (*Rich* v. *Cockell*, 9 Ves. 369; *Wagstaff* v. *Smith*, 9 Ves. 520; *Thackwell* v. *Gardiner*, 5 De G. & Sm. 58; *Hodgson* v. *Hodgson*, 2 Kee. 704; *Humphrey* v. *Richards*, 2 Jur. N. S. 432; *Noble* v. *Willock*, 8 L. R. Ch. App. 778); and the power of a married woman to dispose of personal property settled to her separate use extends to interests in reversion, as well as those in possession: *Sturgis* v. *Corp*, 13 Ves. 190; *Stamford, Spalding, and Boston Bank* v. *Ball*, 4 De G. F. & Jo. 310.

Where a married woman making a will has property settled to her separate use to satisfy the words of her will, it will not be held to be made in execution of a special power to which she does not refer: *Evans* v. *Evans*, 23 Beav. 1. Secus, where the will of a married woman having a general power would, if not held to be in execution of it, be inoperative: *Shelford* v. *Ackland*, Ib. 10.

As to *real* estate, it has always been considered to be clear that when it was settled to the separate use of a feme covert, she had the same power over her *life interest* therein as she would have as a feme sole, and a contract to sell or mortgage her interest has been always specifically enforced against her separate estate, though not against herself personally: *Stead* v. *Nelson*, 2 Beav. 245; *Wainwright* v. *Hardisty*, 2 Beav. 363; *Willcocks* v. *Hannyngton*, 5 Ir. Ch. Rep. 33; *Blatchford* v. *Wooley*, 2 Drew. & Sm. 204; 32 L. J. (Ch.) 534. In *Major* v. *Lansley*, 2 Russ. & My. 357, where a married woman, being entitled for life to her separate use, to a reversionary interest in an annuity charged on real estate, joined with her husband in assigning it, Sir *John Leach*, M. R., although she had levied no fine, held her bound, after the death of her husband, by the assignment. So, in *Newcomen* v. *Hassard*, 4 Ir. Ch. Rep. 268, where a married woman and her husband assigned a rent-charge to which she was entitled to her separate use for life, it was held by the Master of the Rolls of Ireland, that the deed did not require acknowledgment under the Irish statute for the abolition of fines and recoveries (4 & 5 Will. 4, c. 92).

It was, however, held by many judges that a feme covert could not by will dispose of real estate settled to her separate use, without an express power of appointment nor by act inter vivos, otherwise than by fine or recovery, or since the Fines and Recoveries Act (3 & 4 Will. 4, c. 74) by deed

duly executed in conformity with its provisions, so as to disinherit or bind her heir: *Churchill* v. *Dibben*, 2 Kenyon's Rep., pt. ii. 98, 84; *Anon.* cited in *Peacock* v. *Monk*, 2 Ves. 380; *Newcomen* v. *Hassard*, 4 Ir. Ch. Rep. 268, 273, 274; *Harris* v. *Mott*, 14 Beav. 169; *Lechmere* v. *Brotheridge*, 32 Beav. 353.

The result, however, of the recent authorities, establishes as a general proposition that a married woman having real property settled to her separate use in fee, and not restrained from alienation, has as incident to her separate estate, and without any express power, a complete right of alienation by instrument inter vivos (not acknowledged under the Fines and Recoveries Act—3 & 4 Will. 4, c. 74) or by will. This is expressly decided by Lord Chancellor *Westbury* in the leading case of *Taylor* v. *Meads*, 34 L. J. (N. S.) Ch. 203; 4 De G. Jo. & Sm. 597. There a testator by his will (made since 1 Vict. c. 26), gave real estate *to trustees* upon trust for E. M., a married woman, her heirs and assigns, and to be conveyed by her to such person as she, notwithstanding her coverture, should direct or appoint by any instrument in writing to be by her signed, sealed, and delivered in the presence of and attested by two or more credible witnesses, and in default for E. M., her heirs and assigns, *for her separate use*. E. M. devised the estate to her husband by a will, duly executed in conformity with the Wills Act, but not sealed. It was held by Lord Chancellor *Westbury*, reversing the decision of Sir *John Romilly*, M. R., upon this point, that the power was not well executed, but his Lordship also held that the equitable fee to which, in default of appointment, she was entitled to her separate use, was well devised by her will. "With regard to the question," said his Lordship, "upon which there has been no decision in the Court below, namely, whether in a case where real estates are conveyed or devised to trustees in fee, upon trust for the sole and separate use of a married woman and her heirs, she has the same power of disposition by deed or will over the equitable fee, as she would have if she were a feme sole. Can she convey the equitable fee without the necessity for the instrument being acknowledged in the manner required by the statute for the abolition of fines and recoveries? and can she during coverture, devise the equitable estate by a will executed in conformity with the statute?

"There is no difficulty as to the principle. When the Courts of Equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent

personal status, and to make her in equity a feme sole. It is of the essence of the separate use, that the married woman shall be independent of, and free from the control and interference of her husband. With respect to separate property, the feme covert is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is sui juris. To every estate and interest held by a person who is sui juris, the common law attaches a right of alienation, and accordingly the right of a feme covert to dispose of her separate estate was recognized and admitted from the beginning until Lord *Thurlow* devised the clause against anticipation (see *Parkes* v. *White*, 11 Ves. 209, 221). But it would be contrary to the whole principle of the doctrine of separate use, to require the consent or the concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of. That would be to make her subject to his control and interference. The whole matter lies between a married woman and her trustees: and the true theory of her alienation is, that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the feme covert's equitable interest. When the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity.

"With regard to the ordinary equitable estate belonging to a feme covert—for example, where lands are given to trustees in fee upon trust for a married woman and her heirs, or for a single woman in fee, who afterwards marries,—equity follows the law, and, preserving the analogy between legal and equitable estates, requires that the equitable estate of the married woman shall be dealt with inter vivos in the same manner as a legal estate; and in like manner an estate of this nature cannot be devised by a feme covert for the incapacity to make a will of land by the 14th section of the Statute of Wills (34 & 35 Hen. 8, c. 5), in this respect, is not removed by the new Wills Act (1 Vict. c. 26); but the interest created by the separate use is the creature of a court of equity, to which there is nothing correspondent at law, and which would be deprived of its character if it were made subject to a form of alienation that proceeds upon the basis of the existence of control and interest in the husband, and personal disability in the wife. The violence thus done by courts of equity to the principles and policy of the common law as to the status of the wife during coverture is very remarkable, but

the doctrine is established, and must be consistently followed to its legitimate consequences.

"It is right to advert in a few words to the statute law and to the decided cases. By the 14th sect. of the Statute of Wills (34 & 35 Hen. 8, c. 5), it was enacted that wills or testaments, made of any manor, lands, tenements, or other hereditaments, by any woman covert, should not be taken to be good or effectual in law. This enactment, no doubt, referred to lands vested in a feme covert in fee simple, and of which her husband was seised jure uxoris. Courts of equity appear to have considered it as not applicable to separate estate, which was unknown at the time of the passing of the statute. Between that time and the act of 1 Vict. c. 26, the doctrine of the separate use was fully established, and the feme covert, when not restrained from alienation, was considered in equity entitled to the same rights of alienation over her separate property as were possessed by persons sui juris. Then followed the present Wills Act (1 Vict. c. 26), by which it is enacted that no will made by a married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act. This brings us to the decided cases, in which there is some inconsistency, but they preponderate greatly in favour of the proposition that a feme covert, when not restrained from alienation, has in equity the same jus disponendi over her separate estate by deed or will as she would have if free from the disability of coverture. In addition to *Peacock* v. *Monk* (2 Ves. 190), and the well-known decision of Lord *Thurlow*, it is sufficient to refer to *Tullett* v. *Armstrong* (1 Beav. 1, 4 My. & Cr. 377) and *Baggett* v. *Meux* (1 Ph. 627), the judgment of Lord Justice *Turner* in *Atchison* v. *Le Mann* (33 L. T. 302); and finally to the recent case of *Adams* v. *Gamble* (12 Ir. Ch. Rep. 102), where the point was expressly determined. From the earlier decisions Lord *St. Leonards*, in his book on Powers, derived the same conclusions, which he states in these words: 'When a married woman has property settled to her separate use, without any restraint on alienation, she is deemed a feme sole, and may dispose of it accordingly.' I must hold therefore, that a feme covert, not restrained from alienation, has as incident to her separate estate, and without any express power, a complete right of alienation by instrument inter vivos or will."

A married woman also, to whom the legal fee of real estate has been devised to her separate use, without the intervention of trustees, may dispose of the equitable fee by her will during coverture in the same way as if she were a feme sole. *Hall* v. *Waterhouse*, 5 Giff. 64, 13 W. R.

(V.-C. S.) 666, 11 Jur. N. S. 361. See also *Pride* v. *Bubb*, 7 L. R. Ch. App. 64.

Of course, where real property is given absolutely to a married woman, but the gift thereof to her separate use extends merely to her life interest, and not to the corpus of the estate, a devise by her of such real property will be invalid: *Troutbeck* v. *Boughey*, 2 L. R. Eq. 534.

It has been decided in Ireland that where property is limited to the separate use of a married woman, upon a contingency which has not happened, she cannot, pending the contingency, dispose of her interest in the property. See *Mara* v. *Manning*, 2 J. & L. 34. There a fund was settled on a husband until his insolvency, and then to the separate use of the wife: the trustee at the solicitation of the wife committed a breach of trust by lending part of the fund to the husband, who became insolvent. The wife claimed the whole fund. Sir *E. Sugden* decided that the contingent interest of the wife for her separate use was not bound to make good to the trustees the money advanced by them at her request, but his Lordship reserved the question whether her life interest, after the decease of her husband, was so bound; and in *Bestall* v. *Bunbury*, 13 Ir. Ch. Rep. 318, following *Mara* v. *Manning*, it was held, that a married woman cannot dispose of an interest in realty given to her for her separate use on a contingency—viz, the insolvency of her husband—until the event has happened upon which her estate arises. See also *Keays* v. *Lane*, 3 I. R. E. 1; *Luther* v. *Bianconi*, 10 Ir. Ch. Rep. 194; *Re Smallman's Estate*, 8 I. R. Eq. 249. It may perhaps be doubted whether the English Courts would follow the Irish cases. See ante, p. 529.

It may be here mentioned that where by an instrument executed before the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), real property is settled to the use of a married woman for life, for her separate use, with remainder over in tail, she is, under the 24th section of the act, the sole protector of the settlement, and her husband's consent is not requisite under the 34th section, to enable the tenant in tail to make an absolute disposition of the property: *Keer* v. *Brown*, Johns. 138.

Upon the principle that a married woman has an absolute power of alienation over her separate property, she will by concurring with her trustees in a breach of trust which results in the loss of a fund settled to her separate use, be held to have disposed thereof, and cannot call upon the trustees to replace it (*Crosby* v. *Church*, 3 Beav. 485; *Brewer* v. *Swirles*, 2 Sm. & G. 219; *Hanchett* v. *Briscoe*, 22 Beav. 496; *Mant* v. *Leith*, 15 Beav. 524), unless she is restrained from anticipation: *Davies* v. *Hodgson*, 25 Beav. 186. But

she cannot compel the trustees to make good a fund which she was only entitled to upon a contingency for her separate use, and which the trustees before the contingency happened, in breach of trust, upon her solicitation, lent to a person who afterwards became insolvent. *Mara* v. *Manning*, 2 J. & L. 34, but see *ante*, p. 533.

Although the separate estate of a married woman is not in general liable for breaches of trust or torts committed by her (*Wainford* v. *Heyl*, 20 L. R. Eq. 321), it has been decided that a wife's property settled to her separate use, is applicable to make good a loss occasioned by her own breach of trust, in making away with other property under the same trust: (*Clive* v. *Carew*, 1 J. & H. 199) and the *arrears* of income under the same trust, though settled to her separate use without power of anticipation, are also liable (*Pemberton* v. *M'Gill*, 1 Drew. & Sm. 266); but the *future income of property* so settled is not liable during her coverture. See *Clive* v. *Carew*, 1 J. & H. 199; *Pemberton* v. *M'Gill*, 1 Drew. & Sm. 266; *Jackson* v. *Hobhouse*, 2 Mer. 488; and see the note to *Brice* v. *Stokes*, vol. ii., as to the effect of acquiescence in a breach of trust.

And it has been recently laid down by Sir *G. Jessel*, M. R., that it is not impossible that a married woman may so deal with copyright to which she is entitled for her separate use as to prevent the assigns of that copyright from breaking her contract. "To illustrate," said his Honor, "what I mean, take a simple instance. Suppose a married woman, having a copyright settled to her separate use, agreed to give an exclusive right to the publisher to publish an edition of 10,000 copies of a book, and at the same time agreed that in consideration of his agreeing to publish it at a given price per copy, and to pay her a sum of money, she would not grant a license to any other person for a definite period to publish that book, and would not allow it to be published either by herself or anybody else—that sort of contract would, I think, be enforceable against any one who took either an assignment or sale of the copyright with notice. If it were otherwise, instead of a married woman having the power of dealing with her property in the same way as a man, she would not have the power of entering into the same beneficial arrangement as a man can enter into." *Warne* v. *Routledge*, 18 L. R. Eq. 497, 500.

Lord *Thurlow*, in *Hulme* v. *Tenant*, following the opinion that at one time was prevalent, thought that trustees were essentially necessary to the existence of separate property. It has, however, been long since established, that, if real or personal estate be given to or settled upon a married woman for her separate use, with-

out the interposition of trustees, still, in equity, the intention will be effectuated, and the wife's interest protected by the conversion of her husband into a trustee for her (*Bennett* v. *Davis*, 2 P. Wms. 316; *Parker* v. *Brooke*, 9 Ves. 583; *Rich* v. *Cockle*, 9 Ves. 375; *Rolfe* v. *Budder*, Bunb. 187; *Prichard* v. *Ames*, 1 T. & R. 222; *Newlands* v. *Paynter*, 10 Sim. 377; 4 My. & C. 408; *Archer* v. *Rorke*, 7 Ir. Eq. Rep. 478; *Gardner* v. *Gardner*, 1 Giff. 126); and where there are trustees (notwithstanding the decision of Lord *Rosslyn*, in *Whistler* v. *Newman*, 4 Ves. 129; and *Mores* v. *Huish*, 5 Ves. 692), it is now clear, that a married woman can bind her separate property, without their assent, unless it is rendered necessary by the instrument giving her that property. See *Essex* v. *Atkins*, 14 Ves. 542, where the grant of an annuity by a married woman out of her personal property settled to her separate use was established, without the assent of the trustees. See, also, *Grigby* v. *Cox*, 1 Ves. 518; *Pybus* v. *Smith*, 1 Ves. jun. 193; and *Parkes* v. *White*, 11 Ves. 223. The cases of *Whistler* v. *Newman* and *Mores* v. *Huish* may, therefore, be considered as overruled. Indeed, it has been held that, where a trustee has received notice of a charge made by a married woman on her separate property, in his hands, he will be held personally liable for payments subsequently made to her: *Hodgson* v. *Hodgson*, 2 Kee. 704.

A married woman may give to her husband the same interest in her separate property, as she can to any other person (*Essex* v. *Atkins*, 14 Ves. 542; *Grigby* v. *Cox*, 1 Ves. 518; *Gardner* v. *Gardner*, 1 Giff. 126); but where a fund settled to her separate use is transferred to him, the onus lies upon him of showing that it was intended as a gift (*Rich* v. *Cockle*, 9 Ves. 375); and where it consists of a fund in court, it will not be paid to her husband, unless her consent is taken in court: *Milnes* v. *Busk*, 2 Ves. jun. 488, 500; *Wordsworth* v. *Dayrell*, 4 W. R. 689.

A husband may also give property to trustees, or make himself a trustee for the separate use of his wife. But in order to constitute a gift between husband and wife there must be a clear irrevocable gift to a trustee for the wife, or some clear and distinct act of the husband, by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of his wife. See *Mews* v. *Mews*, 15 Beav. 529; there a farmer's wife, with his knowledge and sanction, deposited the produce of the surplus butter, eggs and poultry, with a firm in her own name, and he called it "her money." On his death-bed he gave his executor directions to remove the money, and do the best he could with it for his wife.

It was held by Sir *John Romilly*, M. R., that the evidence was not sufficient to establish a gift between them, and that the husband had neither made himself nor the firm trustees for his wife.

A wife will have the benefit of any outlay by her husband upon real estate, settled to her separate use: if, for instance, he builds houses upon it with his own money, the houses so built will become the wife's, and her interest in them will be to her separate use: *Barrock* v. *M'Culloch*, 3 K. & J. 110, 124. *Grant* v. *Grant*, 34 Beav. 623; 13 W. R. (M. R.) 1057.

Although a parol agreement before marriage that particular chattels of the wife shall be possessed by her for her separate use, is not binding upon the husband; yet, if the agreement be acted upon by the chattels being placed under the dominion of the trustees and treated as separate property, the agreement may be made effectual: *Simmons* v. *Simmons*, 6 Hare, 352.

As to a married woman's power of disposition, where she takes only a partial interest, to her separate use, with a power of appointing the capital.]—It has been laid down by an able writer that the following conclusions might be drawn from the cases, viz., "That when a wife takes an express estate for life in a fund for her separate use, with power to appoint the principal after her death, in such instances the wife can only dispose of the capital by an execution of her power, which may be immediate, if the power authorise a deed; but if it require the appointment to be made by will only, the disposition cannot take effect till after the appointor's death, and the wife is precluded from making 'an immediate' disposal of the fund:" 2 Bright, H. & W. 235, and he cites *Bradly* v. *Westcott*, 13 Ves. 445, 451; *O'Keate* v. *Calthorpe*, 8 Ves. 117, cited; *Reid* v. *Shergold*, 10 Ves. 370, 380; *Anderson* v. *Dawson*, 15 Ves. 532; *Sockett* v. *Wray*, 4 Bro. C. C. 483. And the received opinion seems formerly to have been that the execution of the power was requisite during coverture, although the ultimate limitation might be to the wife, her executors, administrators, and assigns: 2 Bright, H. & W. 235, and see *Heatley* v. *Thomas*, 15 Ves. 597; *Sockett* v. *Wray*, 4 Bro. 483; *Richards* v. *Chambers*, 10 Ves. 118; *Lee* v. *Muggeridge*, 1 V. & B. 118; *Nixon* v. *Nixon*, 2 J. & L. 416.

The tendency however of the modern decisions is to give married women an absolute separate use in property, where formerly the separate use would have been restricted to their lives, with a power of appointment to take effect on their deaths. Thus where there is a gift to a married woman to her separate use for

life, with remainder as she should, notwithstanding her coverture, by *deed or will* appoint, and *à fortiori* where there is a remainder to her executors or administrators, it will be treated as an absolute gift to the sole and separate use of the lady. And those words being a mere expansion and expression of what would be implied in the words "sole and separate use," the Courts conceive themselves at liberty to hold that such a form of gift to a married woman, without any restraint on anticipation vests in equity, the entire corpus in her for all purposes, as fully as a similar gift to a man would vest it in him. *The London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. C. 572, 587, 595; see, also, *Feild* v. *Sowle*, 4 Rep. 112; *Bishop* v. *Wall*, 3 Ch. D. 194.

And there is no distinction between a case where the life estate precedes the power and where it follows it. The true view seems to be this, that for the purpose of giving effect to the general engagements of a married woman, if property is settled upon her for life for her separate use, with power to dispose of it by deed or will, that is her separate property, so as to be subject to her general engagements. See *Mayd* v. *Field*, 3 Ch. D. 587, 593.

Even where real property was given to trustees upon trust for a married woman, her heirs and assigns, with a special power of appointment to her, and an ultimate limitation to *her separate use* in fee, it was held, that the special power of appointment did not derogate from the right of disposition incident to ownership, and that she might consequently dispose of the property by will. *Taylor* v. *Meads*, 4 De G. Jo. & Sm. 597; 34 L. J. (N. S.) Ch. 203.

Although a man having a general power of appointment over property by will, which in default of appointment, goes to others, by exercising his appointment renders the appointed property assets for payment of his debts (*Jenney* v. *Andrews*, 6 Madd. 264; and see note to *Silk* v. *Prime*, vol. ii., *post*), it has been held that if a married woman exercised such a power, although having a life estate to her separate use, the appointed property will not be applicable to the payment of debts which she may have contracted as a feme sole (*Vaughan* v. *Vanderstegen*, 2 Drew. 165; *Hobday* v. *Peters*, 28 Beav. 354, 356; *Blatchford* v. *Woolley*, 2 Drew. & Sm. 204; *Shattock* v. *Shattock*, 2 L. R. Eq. 182; 35 Beav. 489), unless there had been fraud on the part of the married woman, or she had misled persons with whom she had dealings, as for instance by holding herself out to be an unmarried woman, as that would alter the nature of the transaction and make the property liable (*Vaughan* v. *Vanderstegen*, 2 Drew.

363). But this principle was held not to be applicable to a case where a married woman professed to mortgage property to an extent beyond that which she had the power of doing, and the mortgagee was cognizant of all the facts. *Hobday* v. *Peters*, 28 Beav. 354.

Where a married woman has property settled to her separate use for life, with power to appoint by *deed or will*, and with remainder to her executors or administrators, since in effect the property is settled to her separate use, it is not necessary, as is laid down in *Vaughan* v. *Vanderstegen*, to show fraud on her part, but only that she intended to contract, so as to make her separate property liable. See *The London Chartered Bank of Australia* v. *Lemprière*, 4 L. R. P. C. C. 572. There a married woman had personal property, in the hands of her bankers, on an account entitled her account "as administratrix," by settlement on her second marriage, settled it to her separate use, for life, with power to appoint by deed or will, with remainder to her executors or administrators. With her husband's consent she gave a letter to her bankers, instructing them to keep separate accounts, and to consider any private over draft by her on her own account secured by her administration deposits. At this time two sums, 6000*l.* and 8000*l.*, were in deposit on such account, and placed at interest with the bank, who allowed her to overdraw her private account on the strength of the arrangement so made. By her will she executed the power of appointment reserved to her by the settlement, and having at the time of her death overdrawn her private account to a considerable amount, the bankers claimed, as against the parties interested under the will, to retain the sums so paid into their hands on account of the administration account, and especially the sums of 6000*l.* and 8000*l.* so deposited with them, in payment of the sums due to them on account of the overdrafts made by her on her private account, and brought a suit in the Supreme Court of the Colony of Victoria, to enforce such lien. The Supreme Court having dismissed the suit upon the ground, it seems, that as fraud was not proved, the case did not come within the law as laid down by *Kindersley*, V.-C., in *Vaughan* v. *Vanderstegen*, it was held by the Judicial Committee of the Privy Council, reversing such decision, that as the married woman took the 6000*l.* and 8000*l.* to her absolute separate use, and had entered into a contract to give the bankers a lien over such sums, they were bound thereby, and that it was therefore unnecessary to consider whether there had been any execution of a power, or fraud on her part. "In the Supreme Court of Victoria," said *James*, L. J., "the

question appears to have been discussed and determined mainly on the applicability or non-applicability of the case of *Vaughan* v. *Vanderstegen* (2 Drew. 165, 363), which it is necessary, therefore, to consider. In that case the married woman had only power to appoint by will. The Vice-Chancellor held, that a creditor was not entitled to be paid out of property appointed by such will, but on a second hearing held, that where a fraud had been practised on a creditor he was so entitled. His reasoning was shortly this: the fraud created an equitable demand, which would have been enforced against any property of the married woman, and that being so, it would, like a man's debt, be payable not only out of her own assets, but in aid of them, out of any property which she had a general power to appoint, and had actually appointed. It is not easy to see on what principle the fraud could alter the nature of the property subject to appointment, or affect the appointees. It is easy to see how fraud might make that a debt to which the married woman would be in equity liable notwithstanding her coverture, and that, there being such a liability or debt, equity would deal with any property to which she was, notwithstanding coverture, absolutely entitled, and any property over which she had a general power of appointment, exactly as it would do in the case of a man or feme sole dying indebted. Given the relation of debtor and creditor in equity, all the consequences of such relation would appear to follow just as if there were no coverture in the case. But the case of *Vaughan* v. *Vanderstegen* (2 Drew. 163, 165;) was before Lord Justice *Turner* in *Johnson* v. *Gallagher* (3 De G. F. & J. 515), and it was with the full knowledge of that case, and after having had the full advantage of weighing the judgment of Vice-Chancellor *Kindersley* that the Lord Justice *Turner* laid down the propositions which have been previously cited, and the concurrence of their Lordships with which has been above stated. It appears to their Lordships, therefore, that it was not necessary for the plaintiff to make out a case of fraud. All that was necessary was to show that the married woman intended to contract so as to make herself, that is to say her separate property, the debtor, and upon the facts of this case that does not appear for a moment to be open to any substantial doubt. Assuming for a moment that the letter did not operate as a defective execution of her power, it at all events showed unequivocally that she contracted that her interest in the intestate's estate, *i.e.*, her separate property, should be liable to the debt."

Liability of wife's separate estate to her debts and general contracts

not referring to it.]—In the cases before mentioned, the married woman had *acted with respect to* her separate property, and thus shown her intention to deal with it.

The point decided by *Hulme* v. *Tenant* goes much farther than that, and shows that her separate property will be bound by *general engagements in writing* which do not refer to, or make mention of it. It has accordingly been frequently held, that the separate estate of a feme covert is rendered liable to pay her bond (*Lillia* v. *Airey*, 1 Ves. jun. 277; *Norton* v. *Turvil*, 2 P. Wms. 144; *Peacock* v. *Monk*, 2 Ves. 193); although it be given to her husband, or although she have joined in it with him, as in *Hulme* v. *Tenant; La Touche* v. *La Touche*, 3 H. & C. 576; or with a stranger: (see *Heatley* v. *Thomas*, 16 Ves. 596; *Standford* v. *Marshall*, 2 Atk. 68), or a sum which she has covenanted to pay to the trustees of a daughter's marriage settlement, *Mayd* v. *Field*, 3 Ch. D. 587. The same has been held as to a bill of exchange, accepted (*Stuart* v. *Lord Kirkwall*, 3 Madd. 387; and *Owen* v. *Homan*, 4 H. L. Cas. 997); or endorsed (*M'Henry* v. *Davies*, 6 L. R. Eq. 462; 10 L. R. Eq. 88) by a feme covert, and as to a promissory note given by a feme covert in *Bullpin* v. *Clarke*, 17 Ves. 365; *Field* v. *Sowle*, 4 Russ. 112; and the separate estate of a feme covert has been held to be bound by an agreement entered into by her without the knowledge of her husband, to pay an additional rent for a house: *Master* v. *Fuller*, 4 Bro. C. C. 19, 1 Ves. jun. 513. So on an agreement to take a house for a term of years, payment of the past rents was enforced as a charge upon her separate estate. *Gaston* v. *Frankum*, 2 De G. & Sm. 561; 16 Jur. 507. And in *Murray* v. *Barlee*, 3 My. & K. 210, it was held, by Lord *Brougham*, overruling the decision of Sir *L. Shadwell*, V.-C., that the separate property of a feme covert was liable to the payment of the costs of solicitors, whom she had by various letters instructed to act on her behalf with respect to it, promising or giving them to understand that she would pay the costs and charges to become due to them, for business done for her, although she did not refer to her separate property, or expressly promise to pay such costs and charges out of it. "The present," observes his Lordship, "is by no means a case of mere general charge. If it were, I have no doubt that the claim would well lie, but these are written promises. I hold a retainer in writing to imply a promise to pay whatever shall be reasonably and lawfully demanded by the solicitor or attorney acting under that retainer. So, if there be no formal retainer, but only a written acknowledgment or adoption of the professional conduct, or instruc-

tions in writing to proceed further, the party who gives such written instructions, in effect promises to pay whatever may lawfully become due to one acting in obedience to them; that is, to pay the costs which shall be taxed."

In the case of *Barlee* v. *Barlee*, 1 S. & S. 100, it was held that the separate property of a married woman, in the hands of the Court, was liable to the costs of a suit instituted by her touching that property.

And it has been held in the Divorce Court that a woman having separate property is liable to costs in respect of a suit for nullity of marriage improperly instituted against her husband. *M.* v. *C.*, 2 L. R. P. & D. 414; see, also, *Miller* v. *Miller*, 2 L. R. P. & D. 13.

Where, however, a married woman whose husband was insane, instructed a solicitor to act for her and her infant children, appearing by their next friend, in a suit to which she was not a party, and which did not relate to her separate estate, it was held by Sir *John Romilly*, M. R., that her separate estate was not liable for the costs. "There has been," said his Honor, "a misconception of the rights and obligations attaching to the separate estate of a married woman. In *Murray* v. *Barlee*, 3 My. & K. 209, a married woman, in respect of her separate estate, employed a solicitor to conduct the proceedings, and it was held that her separate estate was made liable. That is no authority for creating a liability for costs in this case. Here, a married woman, whose husband, by reason of mental incapacity, was unable to take any steps, goes to a solicitor and directs him to take proceedings for her children. It is a separate and distinct matter. She was not a party to the cause, and the litigation had no relation to her or her separate estate; it was instituted merely to ascertain the rights of her children. From the situation of her husband, she was the person who naturally communicated with the solicitor, and in one sense employed him, but he knew that he was employed to protect the interests of the children, and that the next friend was liable to him; but neither the mother of the children, nor her separate estate, was liable for costs incurred in this matter which did not concern her." *Re Pugh*, 17 Beav. 336.

When a solicitor has been employed on behalf of a husband and wife in respect of the wife's separate estate, in the absence of a special contract, the husband is liable to the solicitor: *Wright* v. *Chard*, 4 Drew. 702, 703.

An application by a married woman to tax a solicitor's bill, for business in respect to her separate estate, must be made by her next friend: *In re Waugh*, 15 Beav. 508. Pending a reference for the taxation of a solicitor's bill

against a married woman, the solicitor cannot maintain a suit to enforce a lien for his bill of costs on her separate estate: *Waugh* v. *Waddell*, 16 Beav. 521.

In many cases it has been erroneously held, that the general engagements of a married woman, in writing, operate and are valid only as appointments made with reference to the separate estate, and not as mere contracts; and consequently, as a mere *verbal contract* cannot operate as an appointment, that the separate estate of a feme covert is not bound by her general engagements, unless they are in writing. See *Clerk* v. *Miller*, 2 Atk. 379; *Dowling* v. *Maguire*, Ll. & G. Rep. t. Plunkett, 19; *Bolton* v. *Williams*, 2 Ves. jun. 142; *Greatley* v. *Noble*, 3 Madd. 94; *Stuart* v. *Kirkwall*, 3 Madd. 389; *Aguilar* v. *Aguilar*, 5 Madd. 418; *Chester* v. *Platt*, 1 V. & B. 334; *Murray* v. *Barlee*, 4 Sim. 82, per Sir *L. Shadwell*, V.-C. The more recent cases, however, upon the authority of the principal case, decide that a feme covert can, as to her separate estate, enter into contracts in the same manner as a feme sole, and that her contracts or engagements, upon this principle, are equally binding whether they are written or merely verbal, and that it is therefore unnecessary, as well as incorrect in principle, to speak of her written engagements as operating merely as appointments. See *Murray* v. *Barlee*, 3 My. & K. 223; *Owens* v. *Dickenson*, 1 Cr. & Ph. 53; *Master* v. *Fuller*, 4 Bro. C. C. 19. Sed Vide *Shattock* v. *Shattock*, 2 L. R. Eq. 182. This doctrine has been most ably supported in Lord *Brougham's* elaborate judgment in *Murray* v. *Barlee*, 3 My. & K. 223. "In all these cases," says his Lordship, "I take the foundation of the doctrine to be this: the wife has a separate estate, subject to her own control, and exempt from all other interference or authority. If she cannot affect it, no one can; and the very object of the settlement which vests it in her exclusively, is to enable her to deal with it as if she were discovert. The power to affect it being unquestionable, the only doubt that can arise is, whether or not she has validly encumbered it. At first, the Court seems to have supposed that nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the Court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the Court held her to have charged it, and made the trustees answer the demand thus created against it. A good deal of the nicety that attends the doctrine of powers thus came to be imported into this consideration of the subject. If

the wife did any act directly charging the separate estate, no doubt could exist; just as an instrument expressing to be in execution of a power, was always, of course, considered as made in execution of it. But so, if by any reference to the estate, it could be gathered that such was her intent, the same conclusion followed. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a feme covert, without any reference to her separate estate, it was held, in the cases I have above cited, that she must be intended to have designed a charge on that estate, since in no other way could the instrument thus made by her have any validity or operation; in the same manner as an instrument, which can mean nothing if it means not to execute a power, has been held to be made in execution of that power, though no direct reference is made to the power. Such is the principle. But doubts have been, in one or two instances, expressed as to the effect of any dealing, whereby a general engagement only is raised; that is, where she becomes indebted without executing any written instrument at all. This point was discussed in *Greatley* v. *Noble*, 3 Madd. 79, and the Master of the Rolls (Sir *John Leach*) appears, in the subsequent case of *Stuart* v. *Kirkwall*, 3 Madd. 387, to have been of opinion that the wife's separate estate was not liable without a charge, and to have supposed that he had before stated that opinion in *Greatley* v. *Noble*, though he by no means expressed himself so strongly in disposing of that case, and distinctly abstained from deciding the point. I own I can perceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in equity taken as a feme sole, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the Statute of Frauds, and to require writing, where that act requires none? Is there any equity, reaching written dealings with the property, which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle. But one of the earlier cases, *Kenge* v. *Delavall*, 1 Vern. 326, makes no mention of such a distinction, for there, being indebted generally is all that is stated as grounding the claim; and in *Lillia* v. *Airey*,

1 Ves. jun. 277, the party who had furnished necessary supplies to the wife, was held entitled to recover to the extent of her separate maintenance. She had, it is true, given a bond, but only for 60*l.*; the Court, however, held the creditor entitled to a larger sum, the separate maintenance exceeding the amount of the bond."

So, also, in *Owens* v. *Dickenson*, Cr. & Ph. 53, Lord *Cottenham*, with reference to a written agreement, observed, "that within the authority of cases which have been decided, it would have been operative upon the feme covert's separate estate, but not by way of the execution of a power, although that has been an expression sometimes used, and, as I apprehend, very inaccurately used, in cases where the Court has enforced the contracts of married women against their separate estate. It cannot be an execution of the power, because it neither refers to the power nor to the subject-matter of the power, nor, indeed, in many of the cases has there been any power existing at all. Besides, as it was argued in *Murray* v. *Barlee*, if a married woman enters into several agreements of this sort, and all the parties come to have satisfaction out of her separate estate, they are paid pari passu, whereas if the instruments took effect as appointments under a power, they would rank according to the priorities of their dates. It is quite clear, therefore, that there is nothing in such a transaction which has any resemblance to the execution of a power; what it is, it is not easy to define. It has sometimes been treated as a disposing of the particular estate; but the contract is silent as to the separate estate, for a promissory note is merely a contract to pay, not saying out of what it is to be paid, or by what means it is to be paid; and it is not correct, according to legal principles, to say that a contract to pay is to be construed into a contract to pay out of a particular property, so as to constitute a lien on that property. Equity lays hold of the separate property, but not by virtue of anything expressed in the contract, and it is not very consistent with correct principles to add to the contract that which the party has not thought fit to introduce into it. The view taken of the matter by Lord *Thurlow*, in *Hulme* v. *Tenant*, is more correct. According to that view, the separate property of a married woman being a creature of equity, it follows, that if she has a power to deal with it, she has the other power incident to property in general—namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which

they can be satisfied . . . I observe, that in *Clinton* v. *Willis* (1 Sugd. Pow. 208, n.), Sir *Thomas Plumer* suggested a doubt whether it was necessary they should be secured *by writing;* and it certainly seems strange that there should be any difference between a contract in writing, when no statute requires it to be in writing, and a verbal promise to pay. It is an artificial distinction, not recognised in any other case. On that point, however, I give no opinion at present."

In a recent case, moreover, a learned judge, whose exposition of the law relating to separate property deserves an attentive perusal, observes, that "it has not yet, indeed, been made the subject of positive decision that the principle of Courts of equity, by which a married woman is constituted a feme sole as to her separate property, embraces her verbal engagements, or cases of common assumpsit; and in the seventh edition of Lord *St. Leonards'* work on 'Powers,' published in 1845 (1 Sugd. Pow. 206), his Lordship observes (though without referring to *Murray* v. *Barlee*, or *Owens* v. *Dickenson*), that the prevailing opinion then was, that her separate estate was not liable to general demands upon her. Considering, however, the opinions I have referred to, and the reason of the thing, I think it very probable, that when that question arises for decision, it will be decided in the affirmative." *Per* Sir *R. T. Kindersley*, V.-C., in *Vaughan* v. *Vanderstegen*, 2 Drew. 183.

Subsequently this very subject was fully discussed in the important case of *Johnson* v. *Gallagher*, 3 De G. F. & Jo. 494, 30 L. J. (N. S.) Ch. 298; 7 Jur. N. S. 273; 9 W. R. (L. J.) 506; and the judgment of Lord Justice *Turner* may be considered as the most accurate exposition of the law thereon. It is thus summed up and adopted by Sir *R. T. Kindersley*, V.-C.: "I think the principle laid down by Lord Justice *Turner*, in *Johnson* v. *Gallagher* is a sound one, and that it is the principle which the Court ought to adopt. As I understand that principle, it is this:—If a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which (if she were a feme sole) would constitute her a debtor, and in entering into such engagement she purports to contract, not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation was contracted in the manner I have mentioned must depend upon the facts and cir-

cumstances of each particular case. It clearly is not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal contract, expressly making her separate estate liable, such contract would bind it; nor is it necessary that there should be any express reference made to the fact of there being such separate estate, for a bond or promissory note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable. If the circumstances are such as to lead to the conclusion that she was contracting, not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation." *Mrs. Matthewman's Case*, 3 L. R. Eq. 787; and see *Hartford* v. *Power*, 3 Ir. R. Eq. 602; *Picard* v. *Hine*, 5 L. R. Ch. App. 274; *The London Chartered Bank of Australia* v. *Lemprière*, 6 L. R. P. C. C. 572; but a verbal engagement will not bind the separate property of a married woman in a case where, had she been a feme sole, a writing would have been required. See *Re Sykes's Trust*, 2 J. & H. 415.

In *Burke* v. *Tuite*, 10 Ir. Ch. Rep. 467, it was held, in Ireland, that a separate estate in realty cannot, by reason of the Statute of Frauds, be bound without writing even if personalty can; see also *Shattock* v. *Shattock*, 2 L. R. Eq. 192; *Johnson* v. *Gallagher*, 2 De G. F. & Jo. 514.

The distinction has likewise been taken, that, as the general engagements of a feme covert are binding upon her separate estate, on the ground only of her intention that they should be a charge upon it, that therefore, when it is not her intention to contract a personal debt, or to charge a gross sum upon her separate estate, the Court cannot raise an *implied assumpsit* to charge it in opposition to her intention. Thus, in *Williams* v. *The Duke of Bolton*, 4 Bro. C. C. 297; *S. C.*, 2 Ves. jun. 138, a married woman, having separate property, for a consideration which she received, sold an annuity charged upon that property. The annuity being void for want of a proper memorial, it was held that the grantee would not have an equity specifically to affect the fund clothed with a trust for the separate use of a married woman, with the consideration, upon the ground of the difficulty of raising an implied assumpsit, contrary to the intention of the parties. See also, *Aguilar* v. *Aguilar*, 5 Madd. 414, and *Jones* v. *Harris*, 9 Ves. 486, in which case an annuity granted by a feme covert, charged upon her separate estate, being void for want of a proper memorial, it was held that the consideration money could not be recovered out of her separate estate. "It is very difficult," said Lord

Eldon, in his judgment, "to maintain, that, where her intention was not to contract a personal debt, or to charge a gross sum upon her separate estate, but the contract was for an annuity, which contract the party dealing with her had it in his power to make effectual, and such as to bind her according to the intention of both, and he failed in that, a Court of equity ought to assist him, and to give him such a charge as she did not intend to give or he intend to have."

In the case of *Callow* v. *Howle*, 1 De G. & Sm. 531, a solicitor of the husband and wife having transacted business relating to the separate estate of the wife, instituted a suit against them and the trustees of the settlement, for payment of his bill of costs out of the wife's separate estate. It did not appear that the wife had, either in writing or verbally, charged her separate property, or expressly contracted or promised to pay the debt out of her separate estate or otherwise. It was held by Sir *J. L. Knight Bruce*, V.-C., that the separate estate was not directly liable. "The question is not before me," said his Honor, "whether the trustees are personally liable; or whether, if the trustees paid the solicitor's bill of costs, they would be entitled to retain the amount out of the rents and profits to which the lady was entitled for her separate use. The question before me is, whether the solicitor in respect of this most just demand against some persons or person, has a direct right to resort to the separate property. . . . The case against the separate property is put upon the *implied contract*, supposed to arise from the nature of the business done, because it has been done mainly in respect of the separate estate. . . . In my judgment, the mere circumstance of the business being done relating to the separate property of a married woman, vested in trustees, is insufficient to make that separate property directly liable to the attorney for expenses incurred with reference to it. The trustees may be liable, or some other person may be liable, but it does not appear to me to follow that the separate property of the wife is directly liable, or that she is liable in respect of the property."

So in *Wright* v. *Chard*, 4 Drew. 673, 1 De G. F. & Jo. 567, where a married woman received from the trustee rents of an estate to which she claimed to be entitled as her separate property, but it turned out that she was not entitled, the Court refused to give relief to the real owner against her other separate estate. See also *Johnson* v. *Gallagher*, 3 De G. F. & Jo. 513; *Shattock* v. *Shattock*, 2 L. R. Eq. 182.

Upon the same principle the separate estate of a married woman is not in general liable for breaches of trust or torts committed by her. See *Wainford* v.

Heyl, 20 L. R. Eq. 321. There an annuity of £100 a year was bequeathed to A. B., a woman then unmarried, upon trust for C. D. during his life. A. B. afterwards married, and under the settlement executed upon her marriage she became entitled to separate estate. A. B., with the assent of her husband, received the annuity, but only applied a small part of it for the benefit of C. D. Upon a bill filed by C. D. to render the separate estate of A. B. liable for what was due to him in respect of the annuity, so far as the estate of her husband might be insufficient to pay the same, it was held by Sir *G. Jessel*, M. R., that he could make no decree against her separate property. "The principle," said his Honor, "as I have always understood it, is this: a married woman is liable —or rather her separate estate is liable (for there is no personal liability as far as she is concerned) —to make good all contracts which are made by her with express reference to the separate estate, or which from the nature of the contract itself must be intended to be so referred; but she is not liable even for general contracts which from their nature cannot be so referred; *à fortiori* she is not liable for general torts, but her husband is liable. Her separate estate may be liable for a fraud *relating to the separate estate*, that is, dealing with the separate estate by way of fraudulent representation. Again, the estate may be made liable for an actual appropriation of funds subject to the same settlement and the same trusts which create the separate estate; in other words, the trustees or persons claiming to be entitled to those other funds may say, as against a woman entitled to the separate estate, 'You have received by anticipation (she not being restrained from anticipation) a part of the separate estate coming to you under that settlement.' That, as I understand, is the decision in *Clive* v. *Carew* (1 J. & H. 199). But apart from such cases as these, one cannot conceive why she should be made liable for general torts in reference to trusts any more than for general torts at law. Strictly speaking, she cannot commit torts; they are torts of her husband, and therefore she creates as against her husband a liability. In the case before me it is difficult to understand if she were in fact a trustee instead of her husband, how the consequence contended for could follow. The husband acts for her, although she remains trustee, just as the husband of an executrix acts for her, and her receipts must be treated as the receipts of the husband, and he alone must be liable." See *ante*, p. 534.

Although the husband have no property out of which to pay his own debts, or to maintain himself or his family by his wife, he will not be able to claim any contribu-

tion for such purposes out of the separate estate of his wife, even if she may have eloped from him. See *Hodgens* v. *Hodgens*, 4 C. & F. 323, 373, where Lord *Cottenham*, C., observed: "The children may want the necessaries of life, they may want the proper means of education; the law does not throw on the mother the duty, the legal obligation (the moral obligation we have nothing to do with here) of maintaining, educating, or providing for the children." See *S. C.*, Ll. & G. t. Sugd. 299; Ll. & G. t. Plunk. 137, 148; 11 Bligh, N. S. 62; and see *Lumb* v. *Milnes*, 5 Ves. 520.

Now, however, by sect. 45 of the Divorce and Matrimonial Causes Act (20 & 21 Vict. c. 85), it is enacted, that "in any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them." See *Milne* v. *Milne and Fowler*, 2 L. R. P. & D. 295; *Stone* v. *Stone and Brownrigg*, 3 Sw. & Tr. 372, 33 L. J. (P. M. & A.) 95; *Sykes* v. *Sykes and Smith*, 2 L. R. P. & D. 163.

And now, under the Married Woman's Property Act, 1870 (33 & 34 Vict. c. 93), a married woman having separate property, is liable to the parish for the maintenance of her husband (sect. 13), and of her children, but so as not to relieve her husband from his liability to maintain them (sect. 14). And see *post*, p. 586, 587.

Although the wife has separate property of her own, she may during the lunacy of her husband pledge his credit for her own maintenance, and her husband, by his estate, will be liable: *Davidson* v. *Wood*, 11 W. R. (V.-C. W.) 561; Ib. (L. J.) 791.

Where, however, a married woman, having separate property, is a lunatic, an allowance will be made to the husband for the extraordinary expenses occasioned by her malady, if he be in poor circumstances and unable to meet them: *Edwards* v. *Abrey*, 2 Ph. 37. And though the Court might not reimburse the husband for what he had actually paid for her maintenance (Ib. 38), the case might be different where money was still due to parties who had the care of her: Ib. 38; and see *Brodie* v. *Barry*, 2 V. & B. 36; and see *In re Baker's Trusts*, 13 L. R. Eq. 168, where the accrued dividends on a fund settled to the separate use of a married woman, who had for many years been an inmate of a pauper lunatic asylum in the Colony of Victoria, Australia, were

ordered to be paid to the Colonial Master in Lunacy towards the payment of expenses incurred for past maintenance; and the future dividends on the same funds were ordered to be paid to the same Master in Lunacy, he being, on the construction of the colonial statute, the committee of the lunatic's estate.

And even if the husband were of ability to maintain his wife under such circumstances, the Court might expend part of her separate income for such purposes; "for," said a learned judge, "if a commission was taken out, I must look at the substantial benefit of the object of it, and must consider the extent, not only of the husband's means, but of his obligation to maintain her; and if the law would not compel him to contribute to her comfort in the degree in which he ought, I should not scruple to direct the committee to apply a part of her separate income:" *Brodie* v. *Barry*, 2 V. & B. 39. See, also, *Nettleship* v. *Nettleship*, 10 Sim. 236: see, also, *Re Evans*, Shelf. on Lunacy, 2nd ed. 204, and *Peters* v. *Grote*, 7 Sim. 238, as to the application of part of the capital belonging to a married woman, a lunatic, and deserted by her husband, for her maintenance.

And where the husband has paid off a mortgage upon the separate estate of his wife, he can charge the same to the extent of the mortgage: *Nelson* v. *Booth*, 5 W. R. 722.

A married woman having shares in a joint-stock company, which are agreed to be settled to her separate use, is liable, so far as her separate estate is concerned, as a contributory, but her husband is not so liable: *Ex parte Luard*, 8 W. R. (V.-C. K.) 73; *In re Leeds Banking Company, Mrs. Matthewman's Case*, 3 L. R. Eq. 781; *Butler* v. *Cumpston*, 7 L. R. Eq. 16.

So where a married woman, having separate estate, contracted to take shares in her own name in a joint-stock company, which she paid for out of her separate estate, the company being afterwards wound up, it was held by Sir *R. T. Kindersley*, V.-C., that as the deed of settlement did not exclude married women from being shareholders so as to bind their separate estate, she ought to be placed on the list of contributories in her own right, so as to bind her separate estate. "If," said his Honor, "a married woman, having separate estate, can contract with another person so as to render that separate estate liable, there seems to be no reason why she may not in like manner contract with a joint-stock company; and if she may so contract to purchase a horse or a jewel, or any other chattel, there is surely no reason why she may not equally contract to buy shares in the company for her own separate use. And if she may thus purchase shares, she may of course stand as a shareholder on the register (supposing there

is nothing in the company's deed to prevent it), so as to make her separate estate liable in respect thereof; and, if that is so, there is no reason why she should not be placed in like manner on the list of the contributories:" *In re Leeds Banking Company, Mrs. Matthewman's Case*, 3 L. R. Eq. 781.

Ordinarily a married woman cannot be made a bankrupt (*Ex parte Holland, In re Heneage*, 9 L. R. Ch. App. 307), but semble she might be so made if she had separate property; Ib., and see *Summers* v. *City Bank*, 9 L. R. C. P. 584.

Of the receipt by the husband of the separate property of wife.]—Where property is settled to the separate use of a married woman, it is clear that if she expressly authorises the money to be paid to her husband, he is entitled to receive it, and she can never recall it (per Lord *Cottenham, C.*, in *Caton* v. *Rideout*, 1 Mac. & G. 601); and it seems also to be now well established, that where a wife tacitly permits, as well as where she expressly authorises, her husband to receive the *income* of her separate property, especially if the husband continues to receive it for a great number of years, and it is applied for the benefit of the family, she cannot claim any reimbursement out of his estate: *Christmas* v. *Christmas*, Sel. Ch. Ca. 20; *Powell* v. *Hankey*, 2 P. Wms. 82; *Pawlet* v. *Delaval*, 2 Ves. 663; *Squire* v. *Dean*, 4 Bro. C. C. 326; *Milnes* v. *Busk*, 2 Ves. jun. 488; *Smith* v. *Camelford*, 2 Ves. jun. 698, 716; *Beresford* v. *Archbishop of Armagh*, 13 Sim. 643; *Bartlett* v. *Gillard*, 3 Russ. 149; *Carter* v. *Anderson*, 3 Sim. 370; *Arthur* v. *Arthur*, 11 Ir. Eq. Rep. 511; *Rowley* v. *Unwin*, 2 K. & J. 138; *Corballis* v. *Grainger*, 4 Ir. Ch. Rep. 173; *Hughes* v. *Wells*, 9 Hare, 749; *Payne* v. *Little*, 26 Beav. 1; and see *Caton* v. *Rideout*, 1 Mac. & G. 529, where Lord *Cottenham*, C., held that the fact that the husband, who, with his wife's concurrence, received the income of her separate estate, was one of the trustees, was immaterial, as it appeared upon the evidence that payment was made to the husband as husband, and not as trustee. "Having," said his Lordship, "come to this conclusion upon the evidence, the result is that the rule, that separate money of the wife paid to the husband with her concurrence, or by her direct authority, must be applied to the present case." In commenting upon the inconvenience of not following the rule, he added: "If I were to hold the contrary, I do not know to what extent such a decision would go. In ninety-nine cases out of a hundred, separate property, which is introduced as a protection to the wife, does not take effect; all things going right, and no distinction being made, the question of separate property does not arise; the property is used as

a common fund for the benefit of the family, and, in that way, naturally falls under the control and management of the husband. If, however, it be once assumed that the wife by herself, or by those who represent her, may call upon the estate of the husband, or the husband himself, to repay the money, so far as they can trace it, it is impossible to tell what confusion might not be introduced into a family; for the wife might say that certain stock had been bought with her property, even where there was positive proof of an appointment by her in favour of her husband. The practice between the husband and wife is proper evidence to show acquiescence and concurrence."

The rule that the arrears of the wife's separate estate cannot be recovered as against the husband, being founded on the presumption that it has been applied to the maintenance of the wife or to the general purposes of the family, with the assent of the wife, does not, it seems, apply where there is a receiver over the property liable to pay it, nor has it any application against a purchaser for valuable consideration: *Foss* v. *Foss*, 15 Ir. Ch. Rep. 215.

In some cases, however, the husband has been obliged to account for one year's receipts: see cases cited in note to *Ex parte Elder*, 2 Madd. 286; and *Howard* v. *Digby*, 2 C. & F. 643; 8 Bligh, N. S. 224, and the comments upon it: Sugd. Prop. 162; *Arthur* v. *Arthur*, 11 Ir. Eq. Rep. 513; *Lee* v. *Grundy*, 1 Jur. N. S. 953; *In re Kirwan*, 1 Ir. R. Eq. 553; *Corballis* v. *Grainger*, 4 Ir. Ch. Rep. 173; *Mackey* v. *Maturin*, 15 Ir. Ch. Rep. 150; and see cases cited in note to *Payne* v. *Little*, 26 Beav. 1.

Where the wife has neither expressly nor by tacit acquiescence authorised her husband to receive the income, she will be entitled to reimbursement out of his estate (*Parker* v. *Brooke*, 9 Ves. 583; *Moore* v. *Moore*, 1 Atk. 272); but where the consent of the wife to her husband receiving the income of her separate estate could not be presumed, on account of her lunacy, an allowance was made to the husband of a proper sum, for what he had expended in her support: *Attorney-General* v. *Parnther*, 3 Bro. C. C. 441.

With regard to the corpus of property settled to the separate use of a married woman, no presumption arises, upon its transfer to her husband, that a gift was intended by his wife, but the onus lies on him of proving that it was so intended, otherwise he will be a trustee for her. See *Rich* v. *Cockell*, 9 Ves. 369, in which case a trustee of stock bequeathed to the separate use of a married woman, transferred it to her husband. The husband failing to prove clearly that his wife intended to give him the stock, he was held by Lord *Eldon* to be a

trustee thereof for her. "As at the time the legacy was given," said his Lordship, "it was for the separate use of the wife, and it continued so until transferred to the husband, that transfer could not destroy the separate trust, unless clear evidence is produced by the husband, that it was intended, with her assent, to destroy it. If the evidence is short of that, as it is perfectly settled that a husband may in this Court be a trustee for the separate use of his wife, he would be precisely in the same situation as to the beneficial interest as the person who made the transfer. Therefore he is a trustee."

The wife may by her acts, without any express gift, show that it was her intention that he should have the control of her separate property without liability to account: *Gardner* v. *Gardner*, 1 Giff. 126.

But when the husband has received, with the consent of his wife, the capital or savings of her separate property, and it is shown that he received them for her use, he is liable to an account. Thus, in *Darkin* v. *Darkin*, 17 Beav. 578, two promissory notes and a gas share were left to a feme sole for her separate use. She married, but they were not settled, and they were subsequently transferred into the name of the husband. Since, however, it appeared from a book of account kept by the husband, that he had received the dividends and interest for the use of the wife, it was held by Sir *John Romilly*, M. R., that after the husband's death they belonged to his wife as her separate estate. "The two promissory notes and the gas shares," said his Honor, "were her separate property. They were transferred to the husband with the assent of the wife; and if he had continued to receive the dividends, then, according to *Caton* v. *Rideout*, it might be inferred that the wife knew of the manner in which they were to be applied, and had agreed that the husband should receive them for his own use and benefit. But this objection is met by the production of the book of account, in the handwriting of the husband, who acknowledges that the dividends and interest were received for the benefit of his wife; and, in 1841, the wife signs the book as having received the dividends herself. In this state of the case it appears to me that I must consider the book evidence. And although the dividends were received by the husband with the sanction of his wife, yet that they were received for her. There is evidence of a trust in writing, and it is therefore unnecessary to resort to the principle laid down in *Rich* v. *Cockell* (9 Ves. 369), that the burthen of proof in such a case lies on the husband." See, also, *Green* v. *Carlill*, W. N. (V.-C. H.), 3rd March, 1877, p. 49.

And the separate estate or the

savings of the wife from separate estate, not given by her to the husband, may be followed *if invested in his name* in real estate. Thus, in *Darkin* v. *Darkin*, 17 Beav. 578, the savings of a wife's separate estate were invested in the joint names of the husband and wife. Afterwards the fund was applied in the purchase of real estate, which was conveyed to her husband absolutely to uses to bar dower. After the death of the husband, it being established by the evidence that the husband was to enjoy the property for life, and that it should afterwards belong to the survivor, it was held by Sir *John Romilly*, M. R., that the devisee of the estate was a trustee for the wife. See *Rowe* v. *Rowe*, 2 De G. & Sm. 294; *Barrack* v. *M'Culloch*, 3 K. & J. 110; *Scales* v. *Baker*, 28 Beav. 91; and see and consider *Hughes* v. *Wells*, 9 Hare, 749.

When a married woman advances a sum of money to her husband out of her separate estate by way of loan, she can prove as a creditor against his estate in an administration suit: *Woodward* v. *Woodward*, 3 De G. Jo. & Sm. 672; 11 W. R. (L. C.) 1007.

Where the evidence of a married woman, a plaintiff in a suit, seeking to make her husband account for part of her separate estate received by him, was tendered in support of her case against her husband, it was held by Sir *J. Parker*, V.-C., that the Law of Evidence Amendment Act (14th & 15th Vict. c. 99) did not take away the incapacity to give evidence between the husband and wife, and the evidence was rejected. For the same reason, the evidence of the husband, a defendant, against his wife, was rejected: *Alcock* v. *Alcock*, 5 De G. & Sm. 761. Such evidence is, however, now admissible under the Evidence Act, 16 & 17 Vict. c. 83, repealed in part by 32 & 33 Vict. c. 68, s. 1.

As to the relief afforded against a married woman having separate estate in respect of her contracts, &c.]—The Court can make no personal decree against a married woman, but can affect her separate estate only: *Francis* v. *Wigzell*, 1 Madd. 264.

The extent of the relief afforded by equity against the separate estate of a feme covert cannot be more correctly laid down than by Lord *Thurlow*, in *Hulme* v. *Tenant*. "Determined cases," observes his Lordship, "seem to go thus far, that the general engagement of the wife shall operate upon her *personal property*, shall apply to the *rents and profits of her real estate*, and that her trustees shall be obliged to apply *personal estate*, and *rents and profits when they arise*, to the satisfaction of such general engagement; but this Court has not used any direct process against the separate estate

of the wife; and the manner of coming at the separate property of the wife has been by decree, to bind the trustees as to personal estate in their hands, or rents and profits, according to the exigency of justice, or of the engagement of the wife, to be carried into execution. . . . . I know of no case where the *general engagement* of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make *conveyance of that real estate*, and by *sale, mortgage*, or otherwise, raise the money to satisfy that *general engagement* on the part of the wife. See, also, *Standford* v. *Marshall*, 2 Atk. 68; *Murray* v. *Barlee*, 4 Sim. 82; *S. C.* 3 My. & K. 209; *Field* v. *Sowle*, 4 Russ. 112; *Nantes* v. *Corrock*, 9 Ves. 189; *Bullpin* v. *Clarke*, 17 Ves. 365; *Jones* v. *Harris*, 9 Ves. 492, 493, 497; *Stuart* v. *Lord Kirkwall*, 3 Madd. 387; *Aylett* v. *Ashton*, 1 My. & Cr. 105, 112; *Francis* v. *Wigzell*, 1 Madd. 258. In *Nantes* v. *Corrock*, 9 Ves. 189, Lord *Eldon* refused to hold stock of a feme covert bound, upon the ground, that stock was not liable to execution, but that objection cannot be raised now, as the Judgment Act (1 & 2 Vict. c. 110, s. 11), renders stock liable to execution.

Where there is a clause against anticipation, attached to a trust for the separate use of a married woman, if she incurs a debt, as, for instance, by giving a promissory note, the creditor will not have a right to be paid, save out of the arrears of interest actually due on the separate estate, when the debt was contracted: *Fitzgibbon* v. *Blake*, 3 Ir. Ch. Rep. 328, 330.

At common law, the husband, *during* coverture, is liable to be sued jointly with the wife in respect of debts contracted by the wife dum sola, because at common law he takes all her property (*Adair* v. *Shaw*, 1 S. & L. 263); and it has been held where the husband and wife were taken in execution, if there was no collusion between the husband and the plaintiff, the wife ought to be detained if she had separate estate; but if she had no separate estate, she would ordinarily be discharged: *Sparkes* v. *Bell*, 8 B. & C. 1; *Newton* v. *Roe*, 7 Man. & Gr. 329; *Evans* v. *Chester*, 2 M. & W. 847; *Evans* v. *Morgan*, 2 Cr. &. J. 453; *Larkin* v. *Marshall*, 4 Exch. 806; *Edwards* v. *Martyn*, 17 Q. B. 693, 700; *Ivens* v. *Butler*, 3 Jur. N. S. 394; 26 L. J. N. S. (Q. B.) 145.

But if no action were brought during the coverture and the wife survived, she remained just as liable for the debt as she was before marriage (*Chubb* v. *Stretch*, 9 L. R. Eq. 559; per Sir *R. Malins*, V.-C.) But if an action were brought and judgment recovered against the husband and wife during the coverture, and the husband became bankrupt and obtained his discharge, the liability of the husband and the wife for the wife's debt was gone at law: *Lockwood* v. *Sal-*

ter, 5 B. & Ad. 303; *Miles* v. *Williams*, 1 P. Wms. 249, 257, but the wife's separate estate will remain liable in equity to satisfy her debts. See *Biscoe* v. *Kennedy*, 1 Bro. C. C. 17 n., *ante*, p. 523 n.; *Chubb* v. *Stretch*, 9 L. R. Eq. 560, where Sir *R. Malins*, V.-C., puts the matter in a very clear light. "There is no question," said his Honor, "that debts incurred by a married woman may be enforced against her separate estate. It is also perfectly clear that if a man by a marriage settlement reserves a life interest for himself in the settled property, that life interest is liable to his creditors. Why should not the same rule apply to a woman? I think that upon every principle of justice, if a woman reserves a separate interest it should remain liable to her creditors."

Now, by the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), a husband married after the Act came into operation (9th August, 1870) is not liable for the debts of his wife contracted before marriage, and the wife is liable to be sued for, and any property belonging to her for her separate use is liable to satisfy such debts, as if she had continued unmarried (sect. 12). But by a subsequent Act (37 & 38 Vict. c. 50), he is rendered liable to the extent of the assets he may have received from his wife. See *post*, 585, 587.

It has been held that a bill filed against a feme covert, to affect her separate estate, will not be defeated by the subsequent death of her husband, although the separate use then ceased (*Field* v. *Sowle*, 4 Russ. 112; *Nail* v. *Punter*, 4 Sim. 555); and it might be filed after his death: *Heatley* v. *Thomas*, 15 Ves. 596; *Johnson* v. *Gallagher*, 3 D. G. F. & Jo. 513, 30 L. J. N. S. (Ch.) 298.

After the death of a feme covert, having separate property, creditors may proceed for payment of their debts out of her separate estate (*Owens* v. *Dickenson*, Cr. & Ph. 48; *Gregory* v. *Lockyer*, 6 Madd. 90); and even before 32 & 33 Vict. c. 46, her specialty debts, as debts by bond, would not have priority over her simple contract debts, but would both be paid pari passu; (*Anon.*, 18 Ves. 258; *Owens* v. *Dickenson*, Cr. & Ph. 53; *Johnson* v. *Gallagher*, 3 De G. F. & Jo. 520; but see *Shattock* v. *Shattock*, 2 L. R. Eq. 182, 35 Beav. 489); in other respects, if she has left a will, her estate will be administered according to the ordinary rules in creditors' suits: *Owens* v. *Dickenson*, Cr. & Ph. 56; *Norton* v. *Turvill*, 2 P. Wms. 144.

Although ordinarily the husband is liable for the funeral expenses of the wife, even if she have separate estate (*Bertie* v. *Lord Chesterfield*, 9 Mod. 31), she may by a charge in her will relieve her husband out of the separate estate, and, in effect, make a present to him of what her funeral expenses would have cost him: *Willeter* v. *Dobie*, 2 K. & J. 647, 649; see *Gregory* v. *Lockyer*, 6 Madd. 90; *Jenkins* v. *Tucker*, 1 H. Black. 90.

Separate estate undisposed of by married woman.]—The undisposed of personal estate of a feme covert not required to meet her debts and engagements unless settled (*Re Rosenthal's Settlement*, 6 W. R. (V.-C. W.) 139), will belong to her husband jure mariti, if in possession. See *Molony* v. *Kennedy*, 10 Sim. 254, where Sir *L. Shadwell*, V.-C., held that cash and bank notes arising from property settled to the separate use of a married woman belonged to her husband in his marital right. See, also, *Johnstone* v. *Lumb*, 15 Sim. 308; *Tugman* v. *Hopkins*, 4 Man. & Gr. 389; *Drury* v. *Scott*, 4 Y. & C. 264; *Bird* v. *Peagram*, 13 C. B. 639; *Askew* v. *Rooth*, 17 L. R. Eq. 426. So the husband, jure mariti, becomes entitled on the death of his wife to her equitable interest in chattels settled to her separate use. *Archer* v. *Lavender*, 9 I. R. Eq. 220; and choses in action, as monies in the funds, settled to the separate use of a married woman, will belong to the husband on taking out administration: *Proudley* v. *Fielder*, 2 My. & K. 57; *Musters* v. *Wright*, 2 De G. & Sm. 777.

The undisposed of real estate of a married woman settled to her separate use of which she is seised in fee descends to her heir, subject, however, to the right of her husband as tenant by the curtesy: *Roberts* v. *Dixwell*, 1 Atk. 607; and see *Pitt* v. *Jackson*, 2 Bro. C. C. 51; *Morgan* v. *Morgan*, 5 Madd. 408; *Follett* v. *Tyrer*, 14 Sim. 125; *Harris* v. *Mott*, 14 Beav. 169; *Appleton* v. *Rowley*, 8 L. R. Eq., 139, overruling on this point, *Hearle* v. *Greenbank*, 3 Atk. 715. *Moore* v. *Webster*, 3 L. R. Eq. 267, seems to have been wrongly decided by Sir *J. Stuart*, V.-C., against the husband's right to curtesy as the wife was seised of the whole equitable fee. See the remarks of Sir *R. Malins*, V.-C., in *Appleton* v. *Rowley*, 8 L. R. Eq. 143.

Lands also purchased by a married woman out of the savings of her separate estate will, upon her death without having disposed of the same, descend upon her heir-at-law or customary heir according to the tenure of the lands respectively: *Steward* v. *Blakeway*, 4 L. R. Ch. App. 603.

Savings and arrears of separate estate.]—It may here be noticed, that a married woman has the same power over the savings arising from her separate property as over property settled to her separate use (*Gore* v. *Knight*, 2 Vern. 535; *Gold* v. *Rutland*, 1 Eq. Ca. Ab. 346, pl. 18; *Fettiplace* v. *Gorges*, 1 Ves. jun. 46; 3 Bro. C. C. 8; *Cecil* v. *Juxon*, 1 Atk. 278; *Muggeridge* v. *Stanton*, 1 De G. F. & Jo. 107; *Askew* v. *Rooth*, 17 L. R. Eq. 426). And the savings arising from her separate property will be liable for her contracts in the same manner as property settled to her separate use. Thus, in *Butler* v. *Cumpston*, 7 L. R. Eq. 16, one of two trus-

tees of a marriage settlement, under which the wife took a separate estate for life, without power of anticipation, having shares in a bank vested in him upon the trusts of the settlement, obtained an allotment of new shares at the request of the wife, and upon the faith of her representations that the purchase money should be paid out of certain savings of her separate estate. It was held by Sir *R. Malins*, V.-C., that the savings of the wife's separate estate were liable to indemnify the trustee against all calls and liabilities incurred on her behalf in respect of the shares.

The savings arising from property in the hands of trustees, settled to the separate use of a married woman without power of anticipation, will not, it seems, be liable to the restraint against anticipation, if she simply transferred such savings to the trustees without showing any intention that such savings were to be held upon the same trusts as the funds from which they were derived: *Butler* v. *Cumpston*, 7 L. R. Eq. 16.

It has been held that where a husband living separate from his wife remits money to her for her support and maintenance, it will be considered as her separate estate, and the husband cannot in equity file a bill against his wife, to recover the savings: *Brooke* v. *Brooke*, 25 Beav. 342; but see *Messenger* v. *Clarke*, 5 Exch. 388.

Arrears of separate estate in the hands of trustees, due at the time of a second marriage, will be considered as retaining their original character (*Ashton* v. *M'Dougall*, 5 Beav. 56); but not, it seems, where the trustees have discharged themselves of the trust by paying them to the lady, or her order, or by her direction, during her widowhood, for then such arrears cease to be separate property; and, upon a second marriage, her husband will become entitled thereto: *Spicer* v. *Dawson*, 5 W. R., M. R. 431.

Aid afforded by Equity to protect and recover the separate property of a married woman.]—Where property was settled to the separate use of a married woman, she would be protected in the enjoyment of it by Courts of equity; and her husband, or his creditors, would, if necessary, be restrained by injunction from interfering with it. Thus, in *Green* v. *Green*, 5 Hare, 400 (n.), a wife, upon a bill filed by her against her husband, obtained an injunction, restraining him from taking proceedings to recover or receive the rents and profits of the trust property (leaseholds), or otherwise intermeddling or interfering with the trust estates, furniture, and effects, and from continuing in possession of a certain house (in which the husband and wife had resided). Upon a motion by the husband to dissolve the injunction, it was argued on his behalf, that the in-

junction restraining him from continuing in possession of the house in which the wife resided, and from interfering with the furniture, operated as a divorce a mensâ et thoro, Sir *L. Shadwell*, V.-C., however, refused the motion, with costs, observing, that "if the injunction had the effect attributed to it,—a question which he could not determine, — the husband would not be without his remedy in the Ecclesiastical Court."

So, likewise, in *Newlands* v. *Paynter*, 4 My. & Cr. 408, a married woman being entitled under a will to leaseholds and furniture to her separate use without the intervention of a trustee, they were seized in execution by a judgment creditor of her husband, Lord *Cottenham*, however, restrained the sale of them by the sheriff, and there being a dispute as to whether the whole of the property passed by will, and as to whether part of the property had not been purchased by the wife out of the savings of her separate estate (in which case it would be equally entitled to protection), his Lordship directed inquiries to ascertain the facts. Courts of law, however, even before the Supreme Court of Judicature Act, 1873, came into operation, took notice of the separate use of a married woman (see pp. 560, 561), and now the restraint of any cause by injunction is thereby prohibited. See sect. 24, sub-sect. 5.

Where a married woman to whom a sum of money was payable for her separate use, received a cheque from the Accountant-General, and handed it over to her solicitor, who accompanied her; the solicitor was, on motion, ordered by Sir *John Romilly*, M.R., to pay the balance to his client; and it was held that the onus being upon the solicitor to show cause for not paying it at once, he could not set up a voluntary agreement to pay a debt due to him from her husband out of it. "An arrangement," said his Honor, "of this sort would not be of the slightest avail. It is an agreement with a married woman who was entitled to receive a sum of money for her separate use, without any professional advice except her personal solicitor, and without any consideration whatever, to pay debts due from her husband, in respect of which she was under no species of liability; and it is clear to me, that the arrangement cannot afford a sufficient reason why her solicitor should not pay over a sum ordered to be paid to her separate use, and which he, accompanying her to the Accountant-General's office, received as her solicitor for that purpose." *Mawhood* v. *Milbanke*, 15 Beav. 36.

But where a husband exercises his legal right by assigning to a purchaser for value without notice, his wife's separate property, she has no remedy against the purchaser. Thus in *Dawson* v. *Prince*,

2 De G. & Jo. 41, a bill of exchange payable to the order of C. D., a married woman, was remitted to her in respect of her separate estate. Her husband got possession of it without her knowledge, forged her name on the back, *then endorsed his own name*, and gave the bill to P. to get it discounted, stating that she had indorsed it. P. got it discounted, and in order so to do was obliged himself to endorse it. He then paid the proceeds to the husband. The acceptor, in consequence of a notice from C. D., refused to pay the holder, who thereupon had recourse to P. P. paid the holder. A suit having been instituted by C. D. to establish her title to the bill, and to restrain P. from suing the acceptor at law: it was held, by the Lords Justices of the Court of Appeal, reversing the decision of Sir *John Romilly*, M. R. (5 W. R. 813), that P. was to be treated as a purchaser of the bill for value, and also that assuming P. to have notice that the bill was drawn in respect of C.'s separate estate, yet as there was nothing to excite suspicion of the forgery, he was justified in relying on the husband's statement that the bill had been indorsed by her, and was not bound to inquire further as to the genuineness of her signature, and that there was therefore no equity to restrain him from the assertion of the legal right which he acquired by the husband's indorsement.

It seems that a married woman could not sue alone in equity for an injunction to restrain a mere personal nuisance, although she alledged that the value of property to which she was entitled to her separate use was thereby depreciated in value; for if the nuisance were merely personal, then it was doubtful whether the wife alone, or by her next friend, could sue without the husband, and injury to her property was not of itself a nuisance: *White* v. *Cohen*, 1 Drew. 312.

Where lands settled in trust for the separate use of a married woman for life without power of anticipation, and after her death in trust for sale, were in her lifetime ordered to be sold under the Leases and Sales of Settled Estates Act, the proceeds of the sale were ordered to be paid to the trustees of the settlement, to be held upon the trusts declared of the purchase money by the settlement: *In re Morgan's Settled Estates*, 9 L. R. Eq. 587.

When a wife assigned her separate property to secure the debt of her husband, she was held entitled as between herself and her husband, and his assignee, under the Insolvent Debtors' Act, to have his property comprised in the same security first applied in payment of the debt: *Aguilar* v. *Aguilar*, 5 Madd. 414.

Even before the passing of the Supreme Court of Judicature Act, 1873, Courts of law recog-

nised transactions between husband and wife relative to the separate estate of the latter, and it was held by the Court of Queen's Bench, that a husband and wife could jointly maintain an action against a party who had received a sum of money at the request of the husband and wife, for the purpose of appropriating it to the separate use of the wife: *Jones* v. *Cuthbertson*, 7 L. R. Q. B. 218; 8 L. R. Q. B. (Ex. Ch.) 504; *Fleet* v. *Perrins*, 3 L. R. Q. B. 536; 4 L. R. Q. B. 500.

So likewise it has been held at common law, upon equitable pleas, that a husband, although having the legal estate, was not able to maintain an action for trespass, wrongful conversion, or assault in respect of acts done with regard to land by the equitable lessee of his wife, who was entitled to it for her separate use: *Allen* v. *Walker*, 5 L. R. Exch. 187.

So in a recent case at common law, furniture had been settled upon a married woman to her separate use, and with money, also her separate property, she from time to time renewed such as wore out. The whole were seized by the sheriff for a debt of her husband. It was held by the Court of Common Pleas that as a Court of equity would, under the circumstances, have restrained the sheriff from selling the accretions as well as the original furniture, a Court of law, upon an interpleader summons, must take notice of the equitable claim of the wife's trustee, and direct the sheriff to withdraw: *Duncan* v. *Cashin*, 10 L. R. C. P. 554.

What words will create a separate use.]—No particular form of words is necessary in order to vest property in a married woman to her separate use; but the intention to give her such an interest in opposition to the legal rights of her husband, must be clear and unequivocal: *Stanton* v. *Hall*, 2 Russ. & My. 180. It has been held that the marital rights of the husband will be defeated if there is a gift or settlement of property to his wife or her trustees for her "separate use" (*Massy* v. *Bowen*, 4 L. R. Ho. Lo. 294, 299, 300); "sole and separate use:" *Parker* v. *Brooke*, 9 Ves. 583; *Archer* v. *Rorke*, 7 I. Eq. Rep. 478; and see *Hulme* v. *Tenant*; or, "for her own use and at her own disposal:" *Pritchard* v. *Ames*, 1 T. & R. 222; "for her own use, independent of her husband:" *Wagstaffe* v. *Smith*, 9 Ves. 520; "for her own use and benefit, independent of any other person:" *Margetts* v. *Barringer*, 7 Sim. 482; *Glover* v. *Hall*, 16 Sim. 568; "for her livelihood:" *Darley* v. *Darley*, 3 Atk. 399. And see *Cape* v. *Cape*, 2 Y. & C. Ex. Ca. 543; but see *Lee* v. *Prieaux*, 3 Bro. C. C. 383; *Wardle* v. *Claxton*, 9 Sim. 324; or, "that she should receive and

enjoy the issue and profits:" *Tyrell* v. *Hope*, 2 Atk. 558. So where, as in *Hulme* v. *Tenant*, there is a direction that "the interests and profits be paid to her, and the principal to her, or to her order by note in writing under her hand;" or, "her receipt to be a sufficient discharge:" *Lee* v. *Prieaux*, 3 Bro. C. C. 381; *Stanton* v. *Hall*, 2 Russ. & My. 180; *In re Molyneux's Estate*, 6 I. R. Eq. 411; or trustees are directed to apply the income of a fund in their discretion, and without being answerable to any one "for the maintenance and support of a married woman:" *Austin* v. *Austin*, 4 Ch. D. 233; or, "to be delivered to her on demand:" *Dixon* v. *Olmius*, 2 Cox, 414; or the husband "is to have no control:" *Edwards* v. *Jones*, 14 W. R. (M. R.) 815.

In the recent case, however, of *Gilbert* v. *Lewis*, 1 De G. Jo. & Sm. 38, it was held by Lord *Westbury*, C., affirming on another point the decision of Sir *W. P. Wood*, V.-C. (2 J. & H. 452), that a devise to a widow "for her sole use and benefit" without the intervention of trustees did not give to her a separate estate.

It appears to have been formerly supposed that the words "sole use" had acquired a technical signification similar to the words "separate use," or "sole and separate use," and were of themselves sufficient to exclude the manifest right to confer upon a woman an estate to her separate use (*Cox* v. *Lyne*, You. Exch. Ca. 562; *Lindsell* v. *Thacker*, 12 Sim. 178); but it may now be considered to be established by the case of *Gilbert* v. *Lewis*, 1 De G. Jo. & Sm. 38, followed by *Lewis* v. *Matthews*, 2 L. R. Eq. 177, and by the decision of the House of Lords in *Massy* v. *Bowen*, 4 L. R. Ho. Lo. 288, affirming the decision of the Court of Appeal in Ireland, reported 1 I. R. Eq. 110 nom. *Massy* v. *Hayes*, that the word "sole" in a will has not a fixed technical meaning like the word "separate," and will not of itself exclude the marital right. See, also, *Green* v. *Marsden*, 1 Drew. 646.

But, as is well observed in a recent decision in Ireland, the primary and grammatical meaning of the word "sole" does signify exclusion: and the real question to be solved is, exclusion of whom? When the woman is unmarried, and the instrument does not in terms, or from the circumstances, point this expression to a future coverture, the exclusion is now settled to be of others in general, and, therefore, not to apply with the required particularity to an after-taken husband. But if the woman is married, the exclusion most natural to occur to the mind of the donor, aware of her coverture, is that of the husband: and he can be excluded only by

holding the property to be to the separate use of the wife. Per *Barlow*, V.-C., in *Hartford* v. *Power*, 2 I. R. Eq. 212. Thus a settlement for the "sole use, benefit, and disposition" of a lady about to marry (*Ex parte Ray*, 1 Madd. 199, 207; and see *Arthur* v. *Arthur*, 11 Ir. Eq. Rep. 511); bequest to a lady about to marry, "for her own sole use and benefit absolutely" (*In re Tarsey's Trust*, 1 L. R. Eq. 561); and a bequest in a will by the words "solely and entirely for her own use and benefit for life," to a married woman (*Ingleficld* v. *Coghlan*, 2 Coll. Ch. C. 247; and see *Green* v. *Britten*, 1 De G. Jo. & S. 649), gave to them separate estates.

And a bequest to an unmarried woman "for her own sole use and benefit" absolutely, has been held to give her a separate estate, because the testator, in another clause in his will, showed he contemplated there a future marriage of the lady, though in the bequest itself there was no reference of any kind to that event. See, also, *Ex parte Killick*, 3 M. D. & De G. 480.

And the interposition of trustees may give to such words as "sole benefit" the same technical meaning as the word "separate:" *Adamson* v. *Armitage*, 19 Ves. 416; *Gilbert* v. *Lewis*, 1 De G. Jo. & S. 38.

And words apparently confining the operation of the separate use clause to members of a class married at the death of the testator, may, by the context, be extended so as to include those married subsequently. Thus, where a testatrix directed "that the legacies and shares of such of my nieces as *are* married shall be to their separate use, free from the debts and control of *any* husband; and, that my trustees *shall have* power to give effect to this my intent," it was held by Sir *L. Shadwell*, V.-C., that the testatrix had used the words in a future sense, and that she intended those of her nieces who married after her death, as well as those who were married at that time, should take to their separate use: *In re Bayliss's Trusts*, 17 Sim. 178.

Where a testator, after giving his residuary property to two nieces, added, "I confine my said legacies hereinbefore mentioned, to be given to my nieces and their children, *without comprehending their husbands*, unless they, my said nieces or either of them, should die without issue;" Sir *John Romilly*, M. R., was of opinion that the only way to give effect to these words was to give the residue between the nieces equally for their *separate* use for life, and after their deaths to their children, and if they had no children, then it would belong to the nieces absolutely: *Dawson* v. *Bourne*, 16 Beav. 29.

Where a testatrix devised a freehold estate to trustees for the

use and benefit of her daughter, who was to receive the rents and profits from the tenants herself, while she lived, whether married or single, and she also directed that no sale or mortgage should be made of the estate or the rents arising from it during the life of her daughter, it was held by the Lords Justices of the Court of Appeal, reversing the decision of Sir *John Romilly*, M. R., that the devise amounted to a gift to the separate use of the daughter without power of anticipation: *Goulder* v. *Camm*, 1 De G. F. & Jo. 146.

An indefinite bequest of the *interest* of a fund to a woman to her separate use, will give to her the *capital* also to her separate use. Thus, where a testator gave the interest of a capital sum of 1000*l.* to his wife for her sole use and benefit, and free from the debts and control of any husband she might marry, and directed that her receipt alone should be a sufficient discharge to his executor, it was held by Lord *Cranworth*, V.-C., that the gift of the interest of 1000*l.* passed the capital to the widow, and that she was entitled to it to her separate use: *Humphrey* v. *Humphrey*, 1 Sim. N. S. 536.

So a bequest of a sum of money to a married woman for her own use, *nevertheless* during her life, the executors were to invest the sum and to pay the dividends during her life to her separate use, independent of any husband, was held to give her an absolute and not merely a life interest: *Gurney* v. *Goggs*, 25 Beav. 334.

In a recent case a testator gave all his real and personal estate to trustees in trust for his wife for life, and after her decease for his daughter absolutely; and he directed that the principal moneys, rents, issues, profits, interest dividends, and proceeds which his wife and daughter, or either of them, should be entitled to under his will, should be paid into their own proper hands as the same became due, and not by way of anticipation; and should be for the separate use and benefit of his wife and daughter; and for which moneys, rents, issues, profits, interest, dividends, or proceeds, the receipt alone of his wife and daughter, whether covert or sole, should be an effectual discharge to his trustees. It was held by Sir *R. T. Kindersley*, V.-C., that the corpus of the real estate was not given to the separate use of the testator's daughter: *Troutbeck* v. *Boughey*, 2 L. R. Eq. 534.

As to the exclusion of the marital right by a French settlement, see *Este* v. *Smythe*, 18 Beav. 112.

But it has been held that no separate use has been created where there is a mere direction "to pay to a married woman and her assigns:" *Dakins* v. *Berisford*, 1 Ch. Ca. 194; *Lumb* v. *Milnes*, 5 Ves. 517; or there is a gift "to her use:" *Jacobs* v. *Amyatt*, 1 Madd. 376, n.; "to her own use

and benefit:" *Johnes* v. *Lockhart*, cited 3 Bro. C. C. 383, n.; *Wills* v. *Sayers*, 4 Madd. 409; *Roberts* v. *Spicer*, 5 Madd. 491; *Kensington* v. *Dollond*, 2 My. & K. 184; *Beales* v. *Spencer*, 2 Y. & C. C. C. 651; to her "absolute use:" *Ex parte Abbott*, 1 Deac. 338; *Darcy* v. *Croft*, 9 Ir. Ch. Rep. 19; unless the context requires the words "absolute use" to be construed as "separate use:" *Shewell* v. *Dwarris*, Johns. 172; or when a payment is directed to be made "into her own proper hands, to and for her own use and benefit:" *Tyler* v. *Lake*, 4 Sim. 144; *S. C.*, 2 Russ. & My. 183; into her proper hands "to her own proper use and benefit:" *Blacklow* v. *Laws*, 2 Hare, 49; but see *Hartley* v. *Hurle*, 5 Ves. 545; or when property is "to be under her sole control:" *Massey* v. *Parker*, 2 My. & K. 174; or where there is a devise without the intervention of trustees, "for her sole use and benefit:" *Gilbert* v. *Lewis*, 1 De G. Jo. & Sm. 38; *Lewis* v. *Matthews*, 2 L. R. Eq. 177; *Massy* v. *Bowen*, 4 L. R. Ho. Lo. 288; *S. C.*, 1 I. R. Eq. 110 nom. *Massy* v. *Hayes*, or a direction to transfer "to own use and benefit:" *Darcy* v. *Croft*, 9 Ir. Ch. Rep. 19, 31. So, a bequest to a woman and her assigns for her life, "for her and their own absolute use and benefit," does not confer upon her a separate estate: *Rycroft* v. *Christie*, 3 Beav. 238.

So, a bequest by will to the testator's wife for life of the income of property, "to be expended by her as she might think fit and proper and agreeable to her free will and pleasure," has been held not to give her a separate use in the same: *Re Graham's Trusts*, 20 W. R. (V.-C. M.) 289.

And where a testator gave 1000*l.* to his sister for her, *or* for her children's *sole* use and benefit for ever, and directed his executors to pay the same to her as soon as possible, it was held that the sister did not take the 1000*l.* to her separate use: *Chipchase* v. *Simpson*, 16 Sim. 485.

As to whether presents made by a husband to his wife before and after marriage will be her separate property, see *Grant* v. *Grant*, 34 Beav. 623, W. R. (M. R.) 1057.

Where a husband and wife agree to live separate, and not to interfere with any property which each may subsequently acquire, the wife's subsequently acquired property will be considered as her separate estate: *Haddon* v. *Fladgate*, 1 Sw. & Tr. 48.

Where a decree erroneously states that a married woman is entitled to her separate use, the Court not having decided what her interest was, it is not binding as a declaration of right, and must be disregarded: *Moore* v. *Walter*, 11 W. R. (V.-C. K.) 713.

As to restraint upon anticipation or alienation.]—When once

it was established that the separate property of a married woman must be so far enjoyed by her as a feme sole, as to bring with it all the incidents of property, and that she might therefore dispose of it as a feme sole, it was found that, to secure her the desired protection against the influence and control of her husband, which, if exercised, would in all probability be destructive of her estate, it was necessary to insert in settlements and wills a clause restraining the wife from anticipating or alienating her separate property. This clause was first inserted in Miss Watson's settlement, by the advice of Lord *Thurlow*, who was a trustee (*Pybus* v. *Smith*, 3 Bro. C. C. 347; *Parkes* v. *White*, 11 Ves. 221; *Jackson* v. *Hobhouse*, 2 Mer. 487; and see the remarks of Lord *Cottenham* in *Rennie* v. *Ritchie*, 12 C. & F. 234); and it is valid, when annexed to a gift to a married woman for her separate use, whether the subject of the gift be real or personal estate, or whether it be in fee or for life only; *Baggett* v. *Meux*, 1 Coll. 138; 1 Ph. 627; *Re Sykes' Trusts*, 2 J. & H. 415.

And where there is a clause simply restraining a married woman from anticipating a sum of stock bequeathed to her, the clause against anticipation will prevent her from alienating the stock during coverture, consequently she cannot if the fund be in Court call for a transfer of it to herself. *In Re Ellis's Trust*, 17 L. R. Eq. 409.

It has not, however, been decided what would be the effect of a similar clause on an absolute gift to a married woman of a fund not producing income. Ib. 414.

Although interest for many purposes is treated as accruing due de die in diem, a married woman upon whom the fund out of which it proceeds is settled to her separate use without power of anticipation, cannot effectually assign an apportioned part of the interest up to the date of the assignment, but can only deal with the interest *after* it has become payable (*In re Brettle*, 2 De G. Jo. & Sm. 79; *Jollands* v. *Burdett*, 10 Jur. N. S. 349), as to which the clause restraining anticipation has no reference. *Claydon* v. *Finch*, 15 L. R. Eq. 266.

Although ordinarily the income of property, settled to the separate use of a married woman, is liable to make good a loss occasioned by her own breach of trust in making away with other property under the trust, if there be a clause against anticipation, future income during coverture will not be so liable; *Clive* v. *Carew*, 1 J. & H. 199; *Pemberton* v. *M'Gill*, 1 Drew. & Sm. 266, ante, p. 534.

Nor is there any equity to apply income which a married woman is restrained from anticipating to make good the consequences of

her fraud, where the restraint on anticipation appears from the instrument in respect of which relief is sought. See *Arnold* v. *Woodhams*, 16 L. R. Eq. 29. There a married woman who had, previously to her marriage, settled property upon trust for herself during the joint lives of herself and her husband for her separate use, without power of anticipation, and after the death of one of them for the survivor for life, and after trusts for the benefit of the children of the marriage, upon such trusts as she should by deed or will appoint, and (there being no children of the marriage) had by deed irrevocably appointed her reversionary interest in favour of her mother, subsequently, and as she alleged, under the compulsion of her husband, made another irrevocable appointment of her reversionary interest in favour of her husband, without noticing the previous appointment. The husband deposited the appointment in his favour to secure a debt due from himself. It was held by Sir *R. Malins*, V.-C., on a bill filed by the assignee of the debt and security, that assuming the second appointment to be a fraud on the part of the wife, inasmuch as it was not based upon any active misrepresentation by her, but disclosed the restraint upon anticipation, and only attempted to deal with the reversionary interest, the assignee of the security was not entitled to impound the income during her life to make good his loss by such fraud.

The clause against anticipation, when annexed to a gift to an Englishwoman whose husband is domiciled abroad, is valid, and it cannot be dispensed with, even although by the law of the country where the husband is domiciled, it is inoperative, because a change of domicile does not prevent an English citizen from taking property according to the form allowed by the law of England: *Peillon* v. *Brooking*, 25 Beav. 218.

Although there is a clause restraining alienation, the income is liable to costs properly incurred by the trustees, at any rate when they have authority under the instrument whereby they are appointed to reimburse themselves: see *D'Oechsner* v. *Scott*, 24 Beav. 239; there property was settled to the separate and inalienable use of a married woman for life, and the trustees were authorised, out of the moneys which should come to their hands, to reimburse to themselves all expenses to be incurred in or about the execution of the trusts or any matter relating to the settlement. A bill filed by her next friend, complaining of a breach of trust and to remove the trustees, was dismissed with costs, but by consent new trustees were to be appointed, and a receiver to get in the income. Before new trus-

tees had been appointed and the costs paid by the next friend, he became insolvent. It was held by Sir *John Romilly*, M. R., that the income in the hands of the receiver was applicable to the payment of the trustees' costs.

And the costs of a married woman, incurred by her in the defence to a suit by her husband, to set aside a post-nuptial settlement, whereby funds were assigned to trustees to secure an annuity to her separate use, without power of anticipation, were under the provisions of sect. 28 of 23 & 24 Vict. c. 127, charged on the annuity: *In re Keane*, 12 L. R. Eq. 115.

By a marriage settlement the income of a trust fund was to be paid during the joint lives of husband and wife, as they should appoint, "*but not so as to deprive themselves of the benefit thereof by charge or otherwise in the way of anticipation.*" Before a divorce *à mensâ et thoro*, they appointed the income between themselves in equal moieties. It was held by Sir *John Romilly*, M. R., that the appointment was valid, as they would not deprive themselves of the benefit of the fund by dividing the income between them: *In re Linzee's Settlement*, 23 Beav. 241.

As the separate use, and the restraint upon alienation, which is a modification of it, are creatures of equity called into existence merely for the purpose of securing to the wife the enjoyment of her own property free from marital rights and influence, they cease to exist when they are unnecessary for that purpose; thus, property given to the separate use of a woman, although subject to restraint upon anticipation, may be aliened by her at any time when she is discovert (*Tullett* v. *Armstrong*, 1 Beav. 1; 4 My. & Cr. 377); or after she has obtained a decree for judicial separation: *Munt* v. *Glynes*, 20 W. R. (M. R.) 823; 41 L. J. Ch. (N. S.) 639.

It was, indeed, at one time, supposed, that the separate use, with the restraint upon anticipation, was only effectual during a coverture in existence at the time of the gift, and did not extend to a subsequent coverture (*Newton* v. *Reid*, 4 Sim. 141; *Brown* v. *Pocock*, 5 Sim. 663; *Woodmeeston* v. *Walker*, 2 Russ. & My. 207); but it is now clearly settled by the leading case of *Tullett* v. *Armstrong*, 1 Beav. 1, that although the separate estate, whether modified by restraint or not, is suspended while a woman is discovert, it is capable of arising upon the happening of any marriage. In that case, a testator gave property to trustees, in trust for his wife for life, with remainder to M. A. T., then a feme sole, for life, in such manner that it should not be anticipated, and that no husband should acquire any control over it. M. A. T. was unmarried at the death of

the testator, but she married in the lifetime of the widow. It was held, by Lord *Langdale*, M. R., whose learned and elaborate judgment has settled the law upon a satisfactory basis, that both the separate use clause, and the restriction against alienation, became effectual on her marriage; and his Lordship laid down the following rules as deduced from the authorities:—

"That property given to a woman for her separate use, independent of any husband, may, under the authority of this Court, be enjoyed by her during her coverture as her separate estate, although the property originally, or at any subsequent period or periods of time, became vested in her when discovert.

"That, in respect of such separate estates, she is, by the Court, considered as a feme sole, although covert. Her faculties as such, and the nature and extent of them, are to be collected from the terms in which the gift is made to her, and will be supported by this Court for her protection.

"The words 'independent of a husband,' whether expressed or implied in the terms of the gift, mean no more than that this Court will not permit the marital power of the husband to be used, in contravention of the enjoyment of the property, according to the terms of the gift.

"If the gift be made for her sole and separate use, without more, she has, during the coverture, an alienable estate independent of her husband.

"If the gift be made to her sole and separate use, without power to alienate, she has, during coverture, the present enjoyment of an unalienable estate independent of her husband.

"In either of these cases she has, when discovert, a power of alienation; the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture; whilst the woman is discovert, the separate estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage.

"The restriction cannot be considered distinctly from the separate estate, of which it is only a modification. To say that the restriction exists, is saying no more than that the separate estate is so modified. The donor, in giving the woman, when married, some of the faculties of a feme sole, has withheld the power of alienation, under the terms of the gift; and, by the aid of this Court, the woman is a feme sole, as to the present enjoyment of the property, but no further; measuring her faculty by the terms of the gift, she is not a feme sole as to the disposition of her property in anticipation of her intended provision. If there be no separate estate, there can be no such re-

striction as that which is now under consideration. The separate estate may, and often does exist, without the restriction, but the restriction has no independent existence; when found, it is as a modification of the separate estate, and inseparable from it."

The decision of Lord *Langdale* was affirmed by Lord *Cottenham*, who observed, that after the most anxious consideration, he had come to the conclusion, that the jurisdiction which the Court had assumed in similar cases, justified it in extending it to the protection of the separate estate, with its qualification and restrictions attached to it, throughout a subsequent coverture, and resting such jurisdiction upon the broadest foundation, and that the interests of society require that this should be done. When the Court first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the laws of property, supported the validity of the prohibition against alienation: 4 My. & Cr. 405. See, also, *In re Gaffee*, 1 Mac. & G. 541; *Scarborough* v. *Borman*, 4 My. & Cr. 378; *Hawkes* v. *Hubback*, 11 L. R. Eq. 5.

Inasmuch as a woman has, when discovert, full power over property settled to her separate use, though coupled with a restraint against alienation, the question sometimes arises whether the lady has not by her acts acquired the property unrestricted and unfettered by any trust or restraint, so that neither attach upon her marriage as they would do in the absence of such acts.

As for instance, when stock has been given to *trustees* for the separate use of a woman, and she afterwards, when discovert, has called upon the trustees to sell the stock, and received from them the proceeds of the sale, the trust for her separate use is clearly at an end. Per *Wood*, V.-C., in *Wright* v. *Wright*, 2 J. & H. 655. So dividends of stock settled as a married woman should appoint and subject thereto to her separate use, received after the death of her husband (*Mayd* v. *Field*, 3 Ch. D. 587), and railway stock arising from the sale of furniture so settled and sold after his death (*Ib.*) will not pass as her separate property under an appointment by will, in exercise of the power made by her during coverture, but will go to her next of kin. *Ib.*

As to the power of a woman when discovert to call for a transfer of property settled to her separate

use, see *Buttanshaw* v. *Martin*, Johns. 89.

The question is more difficult when property has been left to the separate use of a woman without the intervention of trustees. The authorities, however, appear to decide that when a woman, having property so given to her, allows it to remain in statu quo, in the same form of investment in which it was given to her, then on her subsequent marriage her husband must be considered as adopting the property in the state in which it was left, and subject to the trusts which while in that state had been impressed upon it; and the husband, moreover, will be converted into a trustee for the wife: *Newlands* v. *Paynter*, 4 My. & Cr. 408.

But if the woman, being sui juris and discovert, deals with the property so left to her, by converting it into property of a different kind, the trust will be at an end. See *Wright* v. *Wright*, 2 J. & H. 647; there stock in the public funds was bequeathed to a woman for her separate use, without power of anticipation, but without the intervention of any trustee, and she afterwards being discovert and sui juris sold the stock, and spent a portion of the proceeds, and invested the rest in shares of a joint-stock bank and Canada bonds. It was held by Sir *W. Page Wood*, V.-C., that by so doing she determined the trust for her separate use. "Had the lady," said his Honor, "allowed the property to remain in statu quo, had she left it until her marriage in the form of investment in which it was bequeathed to her by her parents, then, according to *Newlands* v. *Paynter*, the husband must have been considered as adopting the property in the state in which they left it, and subject to the trusts which while in that state they had impressed upon it. But she did not leave it in that form; having the sole ownership of the property, and, being single and sui juris, she sold it and received the purchase-money. When the property was in her hands as money, it was absolutely hers, as if it had never been fettered by any trust whatever. By selling the property, she disposed of it finally and entirely . . . . A contrary decision would lead to the absurd consequence that a person about to marry a lady with a handsomely furnished house, would be bound to inquire into the history of every article of furniture, and of the money with which every table and chair was purchased; and if it should turn out that any article of furniture had been purchased with money produced, however remotely, by the sale of property originally impressed with a trust for the lady's separate use, he must in the event of his marrying her be considered in this Court as adopting it in that state, and bound in equity not to disturb it. Cases are conceivable in which

it would be quite as possible to trace the proceeds arising from the sale of property originally impressed with a trust of this description into tables and chairs, as it is in the case before me to trace the proceeds of the stock into shares or bonds; but the mere circumstance of its being possible to trace the proceeds of the sale, cannot enable this Court, in a case like the present, where once the cestui que trust, being discovert and sui juris, has converted the property from its original form, and has dealt with it as absolute owner, to treat the property into which the proceeds of the sale can be so traced as still subject to a trust for her separate use."

A trust for the separate use of a woman may be confined to a particular coverture (*Moore* v. *Morris*, 4 Drew. 33). *Secus* where the words show that the separate use is intended to last during the whole life of the wife. See *Gaffee's Settlement*, 1 Mac. & G. 541; *Hawkes* v. *Hubback*, 11 L. R. Eq. 5, overruling *Knight* v. *Knight*, 6 Sim. 121; *Benson* v. *Benson*, 6 Sim. 126; *Bradley* v. *Hughes*, 8 Sim. 149. *Re Molyneux's Estate*, 6 I. R. Eq. 411.

Restraint on anticipation or alienation cannot be dispensed with by the Court.]—Where there is attached to the separate use of a married woman a clause against anticipation, the Court has no power to release it from that restraint, even in cases where it would manifestly be for her benefit to do so. Thus where a testator gave a married woman a legacy upon condition that she conveyed within twelve months, her separate estate, which was subject to a restraint against anticipation to certain persons, it was held by Sir *John Romilly*, M. R., that effect could not be given to the bequest, though highly beneficial to the married woman. "It is said," observed his Honor, "that these cases of separate use and restraints are mere creatures of equity, and that therefore a Court of Equity may deal with them as it thinks right. It is, no doubt, true that they have arisen from the doctrines laid down by the judges who have presided in courts of equity; but so have all trusts, and it does not therefore follow that this Court can dispense with or mould this fetter as and when it thinks fit. I entirely concur in the argument, that if the Court could, on the present occasion, dispense with it, because it is for the interest of the married woman, it might and would in like manner be dispensed with, if a person offered to give her three times the value of the property to settle it on the same trusts, provided she conveyed her separate and unalienable interest in the property. But I am of opinion that she could not so convey it: the first testator has

thought fit to impose certain fetters on his property, which are sanctioned by the law of England, and which it permits a testator to impose: those fetters remain and make the property in the hands of the devisee or legatee absolutely inalienable for any consideration whatever:" *Robinson* v. *Wheelright*, 21 Beav. 214, affirmed on appeal, 6 De G. Mac. & G. 535. See, also, *Peillon* v. *Brooking*, 25 Beav. 218.

Where there is an absolute gift to a married woman, but with a restraint upon anticipation, the fund cannot during the coverture be parted with by the Court: *Gaskell's Trusts*, 11 Jur. N. S. (V.-C. W.) 780.

So where a married woman who was entitled to the income of property held in trust for her separate use, with a restraint upon anticipation, joined her husband in a power of attorney to receive and sue for any moneys due to them, it was held by Sir *R. Malins*, V.-C., that the trustee was not justified in paying the attorney the wife's separate income: *Kenrick* v. *Wood*, 9 L. R. Eq. 333.

If an estate settled to the separate use of a married woman without power of anticipation, is subject to prior equities, such, for instance, as raising the costs of a suit, the Court may be able to direct a sale of the estate: *Fleming* v. *Armstrong*, 34 Beav. 109.

It seems that the clause restraining a married woman from anticipation does not exempt her from the ordinary consequences of lapse of time and acquiescence (*Derbishire* v. *Home*, 3 De G. Mac. & G. 80. See *Davies* v. *Hodgson*, 25 Beav. 186); and that she can bind herself by a compromise with her trustees as to the amount of the sum settled to her separate use: *Wilton* v. *Hill*, 25 L. J. (Ch.) 156.

What words will restrain alienation.]—As in the case of the separate use, no particular form of words is necessary to restrain alienation, but the intention must be clear. Thus, where there was a direction to pay dividends to such persons and in such manner and form as the wife should, from time to time during her life, notwithstanding her coverture, by any note or writing under her hands appoint, and in default of appointment, into her proper hands for her separate use, and, after her death, to her husband; upon a bill being filed by the husband and wife, it was held there was no restraint upon alienation by the wife, and a transfer of the fund was, with the consent of the wife, made to the husband: *Clarke* v. *Pistor*, cited 3 Bro. C. C. 568; *Pybus* v. *Smith*, 1 Ves. jun. 189; *S. C.*, 3 Bro. C. C. 340; *Witts* v. *Dawkins*, 12 Ves. 501; *Brown* v. *Like*, 14 Ves. 302; *Sturgis* v. *Corp*, 13 Ves. 190. In the case of *Hovey* v.

Blakeman, 9 Ves. 524, where there was a trust to pay rents, dividends, and profits, "into the respective proper hands of the testator's two sisters, so long as they should live, the same to be to their separate use," Sir *William Grant*, M. R., thought, as it was expressed, that an absolute property was not intended to be given to them, so as to give a power of disposition; that it was a personal bequest to them, to be paid into their respective proper hands, without a power of disposition; and he dismissed a petition of an annuitant under a grant from one of them, leaving her to file a bill, but intimating an opinion against it. The authority of *Hovey* v. *Blakeman* is at least doubtful, if it is not to be considered as overruled; for, where expressions giving the wife a right to receive property "with her own hands," or, "with her own hands from time to time," or where equivalent expressions are made use of, they are, to use the words of Lord *Eldon*, "only an unfolding of all that is implied in a gift to the separate use." See *Parkes* v. *White*, 11 Ves. 222; *Acton* v. *White*, 1 S. & S. 429; *Rose* v. *Sharrod*, 11 W. R. (V.-C. K.) 356.

So where a testator, having bequeathed a sum of stock in trust for the separate use of his wife for her life, directed that it "*should remain during her life, and be, under the orders of the trustees, made a duly administered provision for her, and the interest of it to be given to her, on her personal appearance and receipt,*" by the banker the trustee might appoint; it was held by Lord *Cranworth*, V.-C., that the wife was not prohibited from alienating her interest in the stock: *Ross's Trust*, 1 Sim. N. S. 196. See also *Wagstaff* v. *Smith*, 9 Ves. 520, 524. See and consider *Scott* v. *Davis*, 4 My. & Cr. 87, 89.

Although a bequest of stock for a married woman, for her separate use for life, and after her decease, for her appointees, directs that, "in case any appointment should be made by deed, the same should not come into operation until after her death," the married woman is not thereby restrained from anticipation, nor prevented from appointing the fund by an irrevocable deed: *Alexander* v. *Young*, 6 Hare, 393.

In the case of *In re Young's Settlement*, 18 Beav. 199, a testator after bequeathing one-third of his residue to his daughter absolutely, to be vested at twenty-one, but not to be payable until twenty-five, declared that the beneficial interest thereby intended for his daughter should be for her separate use, independent of any husband she might marry, "but should devolve and be settled by deed in writing, upon her in such manner as if she were a *feme sole* and unmarried, and her interest in the said

interest, dividends, and produce, should only be paid, as the same should respectively become and accrue due, and should not be anticipated by any deed or instrument whatsoever: and that in the meantime, and until his daughter should be married, she should only be entitled to receive and take her dividends, interest, and produce, and retain the power to give and bequeath the capital or principal fund by her last will and testament, and which power he thereby conferred upon her." *The daughter being unmarried*, it was held by Sir *John Romilly*, M. R., that she took absolutely, and was entitled to payment of the fund out of Court, on attaining twenty-one.

But where there was a declaration that the receipt of the wife, or any person to whom she should appoint the income of property, *after the same should become due*, should be a valid discharge, it was held that she was restrained from alienation: *Field* v. *Evans*, 15 Sim. 375; but see the comments on this case in *Baker* v. *Bradley*, 2 Sm. & G. 531, 561; *Doolan* v. *Blake*, 3 Ir. Ch. Rep. 340. So, where property is given to the separate use of a married woman "not to be sold or mortgaged," she will take, with a restraint upon alienation: *Steedman* v. *Poole*, 6 Hare, 193. Where, as in *Miss Watson's Case*, there is a gift or settlement of property to the separate use of a married woman, and it is expressed to be without power of anticipation, it is clear that alienation by her is restrained. See *Parkes* v. *White*, 11 Ves. 221; *Sockett* v. *Wray*, 4 Bro. C. C. 483; *Jackson* v. *Hobhouse*, 2 Mer. 487.

Where, according to a form at one time not unusual amongst conveyancers, the income of a fund was payable to such persons as a married woman should by writing, but not by way of anticipation, appoint, and in default of appointment there was a gift of it to her separate use, it was held by Sir *L. Shadwell*, V.-C., that since the clause restraining anticipation was not expressly extended to the gift as well as to the power, she might execute a valid assignment of the income (*Brown* v. *Bamford*, 11 Sim. 127; 12 Sim. 616; and see *Barrymore* v. *Ellis*, 8 Sim. 1); and in another case his Honor held, that unless the clause restraining anticipation was expressly extended to the power, she might execute a valid appointment: *Medley* v. *Horton*, 14 Sim. 222. However, in *Brown* v. *Bamford*, 1 Ph. 620, Lord *Lyndhurst*, although at first he expressed an opinion in accordance with that of the Vice Chancellor, ultimately, upon a re-argument, overruled it; saying that the restriction against alienation extended to the whole gift: that such was the true construction of the bequest, and that it corresponded with what appeared to have been the manifest intention of the testator. See,

also, *Harnett* v. *Macdougall*, 8 Beav. 187; *Moore* v. *Moore*, 1 Coll. 54; and in *Baggett* v. *Meux*, 1 Coll. 138, a testator devised real estate to his daughter, a married woman, in fee, but with a declaration *that she should not sell, charge, mortgage, or encumber* it, followed by another declaration, that she should take it for her own sole and separate use and benefit and disposal, and have the sole management thereof, independent of her husband, and free from his control or intermeddling. It was held by Sir *J. L. K. Bruce*, V.-C., that the restraining clause was not void, inasmuch as it must be taken in connection, as well with the succeeding as the preceding words; and therefore, that a security, by way of equitable mortgage, executed by the husband and wife to a party who had notice of the wife's title under the will, was void as against the wife. This decision, which was affirmed, 1 Ph. 627, must be considered as overruling *Medley* v. *Horton*, 14 Sim. 222. See, also, *Gouldner* v. *Camm*, 1 De G. F. & Jo. 146.

It is not at all necessary that negative words should be introduced in the receipt clause, to complete the restraint upon alienation, for the clause must be construed to relate to the income, subject to such restraints as are imposed by the former part of the settlement. See *Harrop* v. *Howard*, 3 Hare, 624; *Brown* v. *Bamford*, 1 Ph. 626.

Where a person having power to appoint among a class or the children of a marriage, makes an appointment to the separate use of a married daughter, with a clause against anticipation, invalid as a breach of the rule against perpetuities, the Court, in order to prevent the execution of the power from being defeated will reject the clause in restraint of anticipation: *Fry* v. *Capper*, Kay, 163; *In re Teague's Settlement*, 10 L. R. Eq. 564; Leading Cases on Real Prop., 341, 2nd ed. And if a similar appointment be made to an unmarried daughter, who afterwards married, the marriage will not operate as an adoption of the trusts of the fund so as to establish the validity of the clause restraining anticipation: *In re Teague's Settlement*, 10 L. R. Eq. 564.

And where a bequest was made to persons in esse for life, with remainder to their unborn children, with a general direction that female children should take for their "separate and unalienable use," it was held by Lord *Romilly*, M. R., that such restriction was too remote and void: *Armitage* v. *Coates*, 35 Beav. 1. The language, however, of the direction may be such as by implication to confine the restriction to tenants for life: in which case it would be valid. *Ib.*

Where a woman of full age enters into an agreement on marriage for the settlement of her

property to her separate use, it does not seem that the settlement itself should contain a clause against anticipation (*Symonds* v. *Wilkes*, 13 W. R. (L. J.) 1026, reversing the decision of Sir *J. Romilly*, M. R., 12 W. R. 541); at all events the Court cannot act as if such clause were inserted in the settlement, in the absence of a decree for the rectification of the settlement by ordering its insertion. *Ib.* See cases under Settlements directed to be made by Wills, ante, pp. 29, 30.

Statutory extension of the Equitable Doctrine of Separate Use, by 20 & 21 Vict. c. 85.]—It may here be noticed, that under the Act to amend the law relating to divorce and matrimonial causes in England (20 & 21 Vict. c. 85), it is enacted that—"A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or, if resident in the country, to justices in petty sessions, or in either case to the court (for divorce and matrimonial causes) for an order to protect any money or property she may acquire by her own *lawful industry*, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate or justices, or court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a feme sole. Provided always, that every such order, if made by a police magistrate or justices at petty sessions, shall within ten days after the making thereof, be entered with the registrar of the County Court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the Court, or to the magistrate or justices by whom such order was made, for the discharge thereof: provided also, that if the husband or any creditor of, or person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: if any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such deser-

tion of her, in the like position in all respects, with regard to property and contracts, *and suing and being sued,* as she would be under this Act if she obtained a decree of judicial separation." (Sect. 21.) An order of protection obtained by a married woman who has been deserted by her husband does not protect property acquired by immoral practices, as by her living in adultery, and keeping a brothel: *Mason* v. *Mitchell,* 3 H. & C. 528.

It has been held that a married woman who has been deserted by her husband, and has obtained an order for protection, is entitled to sue in tort, as for instance for a libel: *Ramsden* v. *Brearley,* 10 L. R. (Q. B.) 147.

Moreover, "In every case of a *judicial separation* the wife shall from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole* with respect to *property* of every description which she may acquire, or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole, and on her decease, the same shall in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, subject however to any agreement in writing made between herself and her husband while separate." (Sect. 25.)

"In every case of a judicial separation, the wife shall whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her or for any costs she may incur as plaintiff or defendant; provided, that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use." (Sect. 26.)

This Act has been amended by 21 & 22 Vict. c. 108, which gives jurisdiction to the judge ordinary to grant protecting orders (sect. 6), and extends the provisions of both Acts to property of which the wife obtaining such order has or shall become entitled as executrix, administratrix or trustee. (Sect. 7.) The protecting order, which must state the time at which the desertion commenced (sect 9), is to be deemed valid until reversed (sect. 8), and persons or corporations making payments under orders afterwards reversed are to be protected and indemnified. (Sect. 10.)

Where a wife has obtained a protecting order, which, it seems,

is drawn up in general terms (*Mullineux* v. *Mullineux*, 6 W. R. (J. O.) 356), she may obtain payment to herself of money in Court (*In re Kingsley's Trust*, 26 Beav. 84; *In re Rainsdon's Trusts*, 4 Drew. 446), or in the hands of trustees (*Cooke* v. *Fuller*, 26 Beav. 99), although it is given to her separate use, without power of anticipation. (*Ib.*)

And when she is executrix and residuary legatee, or even, it seems, when executrix alone, she may, after obtaining a protecting order, transfer stock standing in the name of her testator in the books of the Bank of England, and receive dividends as if she was a feme sole: *Bathe* v. *The Bank of England*, 4 K. & J. 564.

The protecting order will have a retrospective effect extending back to the commencement of the desertion. Thus, where a married woman having been deserted by her husband acquired some property by her own exertions, which she disposed of by her will and subsequently obtained an order from the magistrates, protecting her earnings and property. It was held by Lord Penzance, that the will was a valid instrument to pass the property acquired by her during such desertion. "It is obvious," said his Lordship, "that the legislature intended that a married woman, from the moment of her desertion by her husband should be treated as a feme sole, although the fact of desertion may not be brought to the attention of the authorities until some time afterwards. The order, when made, is retrospective in its nature; the property therefore acquired by the deceased during the whole period of desertion was her own, and she had a right to dispose of it by will." *In the Goods of Ann Elliott*, 2 L. R. P. & D. 274.

On the discharge of the protecting order, the property of the married woman becomes subject to the rights of her husband (per *Turner*, L.J., in *Rudge* v. *Weedon*, 4 De G. & Jo. 223).

Hence, if a suit has been instituted with reference to such property, which, by reason of the protecting order, has become the separate property of the wife without the husband being made a party, on the discharge of the protecting order the plaintiff should bring the husband before the Court by supplemental order, under 15 & 16 Vict. c. 86, s. 52 (*Rudge* v. *Weedon*, 4 De G. & Jo. 216), but semble that it would not be right to do so if the wife were party to the suit in the character of executrix: *Rudge* v. *Weedon*, 4 De G. & Jo. 223.

As to what constitutes desertion on the part of the husband, see *Ex parte Aldridge*, 1 Sw. & Tr. 88. See 28 Vict. c. 43, being an Act to provide for the security of property of married women separated from their husbands in Ireland.

Statutory extension of the Equitable Doctrine of Separate Use, by the Married Woman's Property Act, 1870, 33 & 34 Vict. c. 93.]—In giving this statute, it will be most convenient to notice,

First, those clauses by which certain property may be acquired by a married woman to her separate use. *Secondly*, those by which (subject to certain provisions, protecting the interests of the husband and his creditors,) investments in Savings Banks, the public stocks and funds, incorporated and joint-stock companies; friendly, benefit, building, or loan societies; or the insurance of her own or her husband's life, may be made or effected for her separate use. *Thirdly*, the clauses giving remedies in equity and at law to the husband and wife; and, *Fourthly*, those relating to the respective liabilities of the husband and wife.

1. *Under* 33 & 34 Vict. c. 93, *what property may be acquired by a married woman to her separate use.*]—The wages and earnings of any married woman acquired or gained by her after the passing of this Act (9th August, 1870), in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property. (Sect. 1.)

Where any woman married after the passing of this Act, shall *during her marriage become entitled* to *any personal property* as next of kin, or one of the next of kin of an intestate, *or* to any sum of money not exceeding 200*l.* under *any* deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same. (Sect. 7.)

Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act, as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same. (Sect. 8.)

Where a sum of money not exceeding 200*l.* has been left to an unmarried woman by the will of a person who died before the

passing of the Married Woman's Property Act, 1870, such sum will nevertheless belong to her to her separate use under that Act, if it became payable to her during a subsequent marriage. See *Howard* v. *Bank of England*, 19 L. R. Eq. 295, there by will dated January 7, 1863, the testatrix bequeathed the sum of 100*l.* to each of the children of R. A., to be paid to them on their attaining their respective ages of 21 years, with benefit of survivorship among them if either should die under that age, leaving no child or children. The testatrix soon afterwards died. One of the children, Rose Ellen, in May, 1872, married W. L., and attained 21 on the 24th of June, 1874. It was held by Sir *G. Jessel*, M.R., that under the 7th section the sum left to her by the will was property to which she was entitled to her separate use.

2. *How certain investments may be made and policies effected for the separate use of a married woman.*

Government annuities and deposits in Savings Banks.]—Notwithstanding any provision to the contrary, in the Act of 10 Geo. 4, c. 24, enabling the Commissioners for the Reduction of the National Debt to grant life annuities and annuities for terms of years; or in the Acts relating to Savings Banks and Post Office Savings Banks, any deposit hereafter made, and any annuity granted by the said Commissioners under any of the said Acts, in the name of a married woman, or in the name of a woman who may marry after such deposit or grant, shall be deemed to be the separate property of such woman, and the same shall be accounted for and paid to her as if she were an unmarried woman: *Provided*, that if any such deposit is made by, or such annuity granted to, a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section 9 of this Act, order such deposit or annuity, or any part thereof, to be paid to the husband. (Sect. 2.)

Public Stocks and Funds.]—Any married woman, or any woman about to be married, may apply to the Governor and Company of the Bank of England, or to the Governor and Company of the Bank of Ireland, by a form to be provided by the governor of each of the said banks and company for that purpose, that any sum forming part of the public stocks and funds, *and not being less than twenty pounds*, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to, or made to stand in, the books of the governor and company to whom such application is made in the name or intended name of the woman, as *a married* woman entitled to her separate use; and

on such sum being entered in the books of the said governor and company accordingly, the same shall be deemed to be the separate property of such woman, and shall be transferred and the dividends paid as if she were an unmarried woman: *Provided*, that if any such investment in the funds is made by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under sect. 9 of this Act, order such investment and the dividends thereof, or any part thereof, to be transferred and paid to the husband. (Sect. 3.) See *Frank* v. *Mackay*, 8 I. R. Eq. 93.

Where a married woman is entitled under section 7 of the Married Woman's Property Act, 1870, to a sum of stock for her separate use, that Act does not empower her to transfer such stock without the concurrence of her husband, unless and until the stock has been placed under section 3 of the same Act, in her name as a married woman, entitled for her separate use. See *Howard* v. *Bank of England*, 19 L. R. Eq. 295. In that case the sum of 107*l.* 12s. consols was standing in the name of three persons, one of whom was a married woman who had been deserted by her husband, and was entitled to the stock to her separate use under section 7 of the Married Woman's Property Act, 1870. Those persons applied to the Bank of England to be permitted to transfer the stock without the concurrence of the husband of the married woman, and the bank having refused, it was held by Sir *G. Jessell*, M. R., that the Bank could not be compelled to permit such transfer.

Incorporated or Joint-Stock Company.]—Any married woman, or woman about to be married, may apply in writing to the directors or managers of any incorporated or joint-stock company that any *fully paid up* shares, or any debenture, or debenture stock, or any stock of such company, to the holding of which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said Company in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed to be the separate property of such woman, and shall be transferred and the dividends and profits paid as if she were an unmarried woman: *Provided*, that if any such investment as last-mentioned is made by a married woman, by means of moneys of her husband, without his consent, the Court may, upon an application under sect. 9 of this Act, order such investment,

and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband. (Sect. 4.)

Upon an application by a married woman under this section to a joint stock or incorporated company to register stock in her name as "a married woman entitled to her separate use," the company must investigate the title; and if they refuse to register, the Court, unless a flaw in the title be shown, will compel them by mandamus to register: *Queen* v. *Carnatic Railway Co.*, 8 L. R. Q. B. 299.

Industrial, Provident, Friendly, Benefit Building, Loan Societies.] —Any married woman, or woman about to be married, may apply in writing to the Committee of Management of any Industrial and Provident Society, or to the trustees of any Friendly Society, Benefit Building Society, or Loan Society, duly registered, certified or enrolled under the Acts relating to such Societies respectively, that any share, benefit, debenture, right, or claim whatsoever in, to or upon the funds of such society, to the holding of which share, benefit, or debenture no liability is attached, and to which the woman so applying is entitled, may be entered in the books of the Society in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such committee or trustees to cause the same to be so entered, and thereupon such share, benefit, debenture, right or claim shall be deemed to be the separate property of such woman, and shall be transferable and payable, with all dividends and profits thereon, as if she were an unmarried woman: *Provided*, that if any such share, benefit, debenture, right or claim, has been obtained by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section 9 of this Act, order the same, and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband. (Sect. 5.)

Fraud on creditors of the husband.] — Nothing hereinbefore contained in reference to moneys deposited in, or annuities granted by Savings Banks or moneys invested in the funds, or in shares or stock of any company, shall as against creditors of the husband, give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any moneys so deposited or invested may be followed as if this Act had not passed. (Sect. 6.)

Policies of Assurance.]—A married woman may effect a policy of assurance upon her own life, or the life of her husband for her separate use, and the same and all

benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman.

A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland, according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the County Court of the district, or in Ireland by the chairman of the Civil Bill Court of the division of the county in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured, an amount equal to the premiums so paid. (Sect. 10.)

The 10th section of the Act has so far modified the 91st section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), that if a trader effects a policy on his own life for the benefit of his wife, or of his wife and children, or any of them, it will be valid, subject to any liability there may be to repay the premiums paid in fraud of his creditors (*Holt* v. *Everall*, 2 Ch. D. 266, 276); but if it appears in the evidence that the premiums had been paid out of the wife's separate estate, the husband's trustee in bankruptcy is not entitled to receive the amount of the premiums out of the insurance money. (*Ib.*)

3. *Remedies of the husband and wife in equity and at law.*

Questions of ownership between husband and wife.] — In any question between husband and wife as to property declared by this Act to be the separate property of the wife, either party may apply by summons or motion in a summary way, either to the Court of Chancery in England or Ireland, according as such property is in England or Ireland, or in England (irrespective of the value of the property) [to] the judge of the County Court of the district in which either party resides, and thereupon the judge may make such order, direct such inquiry, and award such costs as

he shall think fit, provided that any order made by such judge shall be subject to appeal in the same manner as the order of the same judge made in a pending suit or on an equitable plaint would have been, and the judge may, if either party so require, hear the application in his private room. (Sect. 9.)

Action by a married woman.]—A married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have, in her own name, the same remedies, both civil and criminal, against all persons whomsoever, for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property. (Sect. 11.)

Under this section it has been held, that a married woman may maintain an action in her own name to recover damages against her bankers for dishonouring cheques drawn by her in the course of a trade which she carried on separately from her husband, or for not duly presenting or not giving due notice of dishonour of a Bill of Exchange acquired by her in such trade, and intrusted to them by her for presentment, it being a remedy "for the protection and security of her separate property." *Summers* v. *The City Bank*, 9 L. R. C. P. 580.

4. *Respective liabilities of husband and wife.*]—A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts, as if she had continued unmarried. (Sect. 12.) See *Conlon* v. *Moore*, 9 I. R. Eq. 190.

There are no words in this section which can be made to apply to a woman who has no separate property, hence it has been held that a married woman who has no separate property cannot be made a bankrupt thereunder; see *Ex parte Holland*, 9 L. R. Ch. App. 307. In that case, Lord Chancellor *Cairns* seems to have been of opinion that a mar-

ried woman, although having separate property, could not, under this section, be made a bankrupt. "I think," observes his Lordship, "the meaning of the section is, that although the husband is not liable for the debts in question, the separate property of the wife is to be subject to the ordinary process of law or equity. . . . . It would in my opinion be a violent straining of the Act to alter the status of all married women, by making them subject to bankruptcy merely for the sake of carrying out what we may think the logical consequence of this section in the Act." Lord Justice *Mellish*, however, said he was not quite satisfied that if the lady had been shown to have separate property it might not have made a difference. "Because," observed his Lordship, "by the 1st section of the Act a married woman may be a trader, and it appears to me that if a married woman became a trader and had trade assets, it would be analogous to cases under the custom of the City of London, under which it was not unusual for a married woman to be made a bankrupt:" see *Nagle* v. *O'Donnel*, 7 I. R. C. L. 79; *Conlon* v. *Moore*, 9 I. R. C. L. 190.

The 12th section extends to property settled to the separate use of a married woman, without power of anticipation. Where, therefore, after the passing of that Act, and on the same day on which a marriage took place, but subsequently thereto, judgment was entered up against the wife for a debt incurred previously to the marriage, and the judgment creditors subsequently obtained a charging-order on the wife's interest in a fund in court, to the income of which the wife was entitled for her separate use, without power of anticipation, it was held that the charging-order constituted a valid incumbrance on the fund: *Sanger* v. *Sanger*, 11 L. R. Eq. 470.

Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in Petty Sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her, for the maintenance of her husband, as by sect. 33 of "The Poor Law Amendment Act, 1868," they may now make and enforce against a husband for the maintenance of his wife, who becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a

feme sole by such and the same actions and proceedings as money lent. (Sect. 13.)

A married woman, having separate property, shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children, provided always that nothing in this Act shall relieve her husband from any liability at present imposed upon him by law to maintain her children. (Sect. 14.)

The legislature, very justly, not considering it right that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, has by 37 & 38 Vict. c. 50 (passed 30th July, 1874), entitled "An Act to amend the Married Women's Property Act, 1870," and which does not extend to Scotland, enacted that "So much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed so far as respects marriages which shall take place after the passing of this Act, and a husband and wife married after the passing of this Act may be jointly sued for any such debt." (Sect. 1.)

The husband shall, in such action, and in any action brought for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified; and in addition to any other plea or pleas may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified; or confessing his liability to some amount, that he is not liable beyond what he so confesses; and if no such plea is pleaded the husband shall be deemed to have confessed his liability so far as assets are concerned. (Sect. 2.)

If it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defence, whatever the result of the action may be against the wife. (Sect. 3.)

When a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable, shall be a joint judgment against the husband and wife; and as to the residue, if any, of such debt or damages, the judgment shall be a separate judgment against the wife. (Sect. 4.)

The assets in respect of and to the extent of which the husband shall in any such action be liable, are as follows:—

(1) The value of the personal

estate in possession of the wife, which shall have vested in the husband:

(2) The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession:

(3) The value of the chattels real of the wife which shall have vested in the husband and the wife:

(4) The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received:

(5) The value of the husband's estate or interest in any property, real or personal, which the wife in contemplation of her marriage with him shall have transferred to him, or to any other person:

(6) The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall, with his consent, have transferred to any person with the view of defeating or delaying her existing creditors.

And there is a proviso that where the husband after marriage pays any debt of his wife, or has a judgment bonâ fide recovered against him in any such action as is in this Act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action be liable. (Sect. 5.)

Of Pin-money.]—It was said in the leading case of *Howard* v. *Digby*, 8 Bligh, N. R. 259, that no definition of pin-money was to be found in the books upon which reliance could be placed; that the line which divided it from the separate property of the wife could not be traced with any distinctness, or in a way on which dependence could be placed.

Pin-money, however, may be described with sufficient accuracy to be an allowance settled upon the wife before marriage for the wife's expenditure on her person; it is to meet her personal expenses, and to deck her person suitably to her husband's dignity, that is to say, suitably to the rank and station of his wife. *Ib.* p. 268. Gifts or gratuitous payments may from time to time be made by the husband for the same purposes, 2 Bright, H. & W. 288.

This being the object of pin-money, it is evidently different from money settled to the wife's separate use, where the marital right is totally excluded; nor is it like an absolute gift from the husband to the wife. It is necessary to bear this in mind when questions arise relating to arrears of pin-money.

Upon this subject it may be considered to be law, that where the wife permits her pin-money to run in arrear, she cannot, on the death of her husband, claim arrears for more than one year prior

to his death; for the very object of the allowance of pin-money being to enable the wife to deck her person suitably to her husband's rank without having recourse to him continually for small sums of money, excludes the supposition that she may accumulate her pin-money, while her husband pays her bills.

Where, however, a wife from time to time demanded the arrears of her pin-money from her husband, and he promised that she should have it at last, it was held by Lord *Hardwicke*, C., that she was entitled to all the arrears due at her husband's death: *Ridout* v. *Lewis*, 1 Atk. 269.

Where a husband has paid for all the wife's apparel, and provided for all her private expenses, she cannot, it seems, at any rate where there is no evidence that she ever demanded her pin-money, claim for any arrears at the death of her husband (*Powell* v. *Hankey*, 2 P. Wms. 84; *Thomas* v. *Bennet*, 2 P. Wms. 341; *Fowler* v. *Fowler*, 3 P. Wms. 355). And even where the wife has been lunatic, if the husband has maintained her in a manner befitting her rank and station, providing all those things for her for which her pin-money was set apart, neither she nor *a fortiori* her personal representatives can claim any arrears of pin-money: *Howard* v. *Digby*, 8 Bligh, N. R. 224.

The personal representatives of the wife cannot go back for a year, or even any part of a year, for the arrears of pin-money, for the allowance of pin-money has relation only to the personal dress and expenses of the wife: *Howard* v. *Digby*, 3 Bligh, N. R. 245.

As to the origin of pin-money, see Sug. Prop. Ho. Lo. 165 n.

Paraphernalia.]—The paraphernalia of the wife include such apparel and ornaments of the wife as are suitable to her condition in life, such as pearls, rings, watches, and other jewellery given to the wife to be worn as ornaments of her person only: *Graham* v. *Londonderry*, 3 Atk. 394.

Old family jewels, however, of the husband, though worn by the wife, do not constitute part of her paraphernalia, unless she has acquired them by gift or bequest: *Jervoise* v. *Jervoise*, 17 Beav. 566.

The wife has no power to dispose of her paraphernalia during her husband's life (1 Bright, H. & W. 287).

The husband, however, may by act inter vivos during the life of his wife, dispose of her paraphernalia, either by sale or gift: 1 P. Wms. 730; *Wilcox* v. *Gore*, 11 Vin. Ab. 180, Pl. 19; *Northey* v. *Northey*, 2 Atk. 78; *Seymore* v. *Tresilian*, 3 Atk. 358, 359, and see *Hastings* v. *Douglass*, Cro. Car. 344.

He cannot, however, dispose of them by will (*Ib.*), but if he does so and confers other benefits upon the wife by his will, she will be

put to her election between her paraphernalia and the benefits she may take under the will: *Churchill* v. *Small*, 2 Kenyon Rep. part 2, p. 6.

The paraphernalia of the wife, such as jewels purchased by the husband and given to her after the marriage, are liable to the debts of the husband: *Campion* v. *Cotton*, 17 Ves. 273, and see 2 Ves. 7; *Ridout* v. *The Earl of Plymouth*, 2 Atk. 104.

In the administration of assets, however, the widow's claim to her paraphernalia is preferred to general legacies: *Tipping* v. *Tipping*, 1 P. Wms. 730; *Snelson* v. *Corbet*, 3 Atk. 369. Hence she is entitled to have assets marshalled in all those cases in which a general legatee would have that right, viz. as against the heir: see *Tipping* v. *Tipping*, 1 P. Wms. 729, said by Lord *Hardwicke* to be "a leading case followed by the Court ever since:" 3 Atk. 495. See note to *Aldrich* v. *Cooper*, 2 Lead. Cas. Eq. post.

Where, however, a husband only pledges the wife's paraphernalia, and dies leaving a sufficient estate to redeem the pledge and pay all his debts, she is entitled to have it redeemed out of his personal estate even to the prejudice of legatees: *Graham* v. *Londonderry*, 3 Atk. 393.

The widow may bar her right to paraphernalia by settlement (*Cholmely* v. *Cholmely*, 2 Vern. 83), and if her husband bequeaths to her her paraphernalia for life, and she dies without claiming them, as paraphernalia, she will, it seems, be presumed to have elected to take them under the will, and her executor or administrator will not be entitled to them: *Clarges* v. *Albemarle*, 2 Vern. 247.

It must be borne in mind that where articles such as ordinarily constitute paraphernalia are given to the wife, either before or after marriage, by a relative or friend, they will be considered as given to her separate use, in which case, as we have before seen, she may dispose of them as a feme sole, and they will not be liable to the debts or disposition of her husband. Thus, in the leading case of *Graham* v. *Londonderry*, 3 Atk. 393, the question in the cause between Mr. Graham and Lord Londonderry was, whether Lady Londonderry, then the wife of the plaintiff, but originally the wife of the then late Lord Londonderry, was entitled in her own right, or as paraphernalia, to particular jewels thereafter mentioned.

First, as to diamonds given to her by Governor Pitt, her husband's father, and which were a present to her on the marriage with his son, Lord-Chancellor *Hardwicke* said, "This Court of latter years has considered such a present as a gift to the separate use of the wife, and I am of opinion she is entitled in her own right."

The next question was as to four diamonds set about the picture of the late Regent of France. Lord Londonderry retured from France, and delivered this picture to Lady Londonderry, and said at the same time it was a present sent to her by the Regent of France.

With respect to this, his Lordship said, "If this be a present from the regent of France, it falls under the same rule, for being a present from a stranger during the coverture, it must be construed as a gift to her separate use, though I do not think it so clear a case as the others." See also *Lucas* v. *Lucas*, 1 Atk. 270; *Brinckman* v. *Brinckman*, 3 Atk. 394, cited. Sed vide *Jervoise* v. *Jervoise*, 17 Beav. 566.

Gifts also from the husband to the wife may be made to her separate use, where they are made to her absolutely and not merely to be worn as ornaments to her person only. See *Graham* v. *Londonderry*, 3 Atk. 393, where Lord *Hardwicke* says, "I have indeed admitted a husband may make such gifts, but where he expressly gives anything to a wife to be worn as ornaments of her person only, they are to be considered as mere paraphernalia, and it would be of bad consequence to consider them as otherwise; for if they were looked upon as a gift to her separate use, she might dispose of them absolutely, which would be contrary to his intention." See *Grant* v. *Grant*, 34 Beav. 623; 13 W. R. (M. R.) 1057.

EARL OF CHESTERFIELD *v.* SIR ABRAHAM JANSSEN.

February 4th, 1750—1.

[REPORTED 2 VES. 125.]

S. C. 1 Atk. 301, 1 Wils. 286.

POST OBIT SECURITIES—CATCHING BARGAINS WITH HEIRS EXPECTANTS AND REVERSIONERS—CONFIRMATION.]—*A., aged thirty, borrows* 5000*l. from B., upon the security of a bond in the penalty of* 20,000*l., conditioned for payment of* 10,000*l. if A. survived C., his grandmother, from whom he had great expectations, but not otherwise. A. survived C. a year and eight months, and soon after her death executed a new bond in the penalty of* 20,000*l., conditioned for payment of* 10,000*l. to B., which he gave to B. on his delivering up to him the former bond to be cancelled.*

A bill being filed by the executors of A. to be relieved against the latter bond, as given upon a usurious contract, and an unconscionable bargain, the Court was of opinion that the contract was not usurious, and, without giving any opinion whether the transaction was such as the Court ought to relieve against, as an unconscionable bargain with a person dealing with his expectancy, held, that the acts of A., after the decease of his grandmother, amounted to a confirmation of the original transaction, and gave relief only against the penalty of the last bond.

THE state of the case upon the pleadings and proofs, as far as was material for the consideration of the Court, was shortly this. John Spencer, in 1738, being possessed of an income of 7000*l.* per annum, and of a personal estate in plate, jewels, and furniture, to a great value, and having contracted a debt to the amount of 20,000*l.* to

several persons, mostly tradesmen, by whom he was pressed, and which he was desirous to pay off, proposed to borrow money, and particularly a sum of 5000*l.* for that purpose.

As he had a well-grounded expectation of a great increase of fortune on the death of his grandmother, the Duchess of Marlborough, if he survived her, he resolved to contract thereon. He was above thirty, originally of a hale constitution, but impaired; and, although afterwards he lived more regularly, yet he was addicted to several habits prejudicial to his health, which he could not leave off. She was seventy-eight, of a good constitution for her age, and careful of her health.

He sent to market a proposal, which he supposed would easily meet with a purchaser, as it was natural to expect, in common course, that his grandmother should die first, though she was a good old life, and he but a bad young one. This proposal was, that if any one would lend him 5000*l.* he would oblige himself to pay 10,000*l.* at or soon after the death of his grandmother, if he survived her, but to be totally lost if she survived him. This was rejected by several knowing persons as not sufficiently advantageous, as it was at first by the defendant, but afterwards accepted by him; and a bond of 20,000*l.*, conditioned to pay 10,000*l.*, was given on those terms.

[(*a*) The Duchess of Marlborough died the 18th of October, 1744, and in the month of December following, on the defendant's delivering to Mr. Spencer the bond above mentioned to be cancelled, he executed a new bond, whereby he became bound to the defendant in the penalty of 20,000*l.*, conditioned for payment to the defendant of 10,000*l.*, with lawful interest, on the 19th of April then next; and at the same time executed a warrant of attorney to empower a judgment to be recorded against him in the King's Bench, at the defendant's suit, for the said 20,000*l.* on the said bond. The defendant, by virtue of the said warrant of attorney, caused a judgment to be made out on the said bond against Mr. Spencer, at the defendant's suit, for the said 20,000*l.*, to be recorded in

(*a*) This statement between brackets, is taken from 1 Atk. 301.

the King's Bench of Hilary Term next ensuing the date of the said bond.

In the month of December, 1745, the defendant, by the invitation of Mr. Spencer, being with him at his house at Windsor, he, on the 14th of that month, gave the defendant a bill for 1000*l.* on Hoare and Company, in part of the defendant's debt, and on the 21st of March following sent the defendant 1000*l.* more by his steward.

On the 19th of June, 1746, Mr. Spencer died, but before his death made his will, and after payment of his debts and legacies, gave all the residue of his personal estate to be at his son's disposal, the present Mr. Spencer, provided he left no younger child, and appointed the plaintiffs to be guardians of his son, and also executors in trust for him during his minority.

The executors of Mr. Spencer, finding his specialty debts were very considerable, and that such as were upon simple contracts only, which likewise amounted to a very large sum, would receive but little satisfaction through the deficiency of the testator's assets, after payment of such sums as were really and bonâ fide due on specialties, brought a bill to be relieved against the defendant's demand, as being an unconscionable one, charging that the condition stipulated by his security was absolute and independent of any other contingency than that of a grandson of thirty years of age surviving a grandmother of eighty; and as the period or point of time limited for the payment (which was in one month after the death of the duchess) could not, by reason of her great age and infirmities, be removed to any great distance, but was every day approaching, and in fact happened soon after, so the requiring such a large sum as 10,000*l.* for the forbearance of 5000*l.* for so short a time, being at the proportion of 200*l.* for every 100*l.*, was a most usurious contract, and such as will never meet with the approbation or countenance of a Court of equity, especially where the demand is made upon the assets of an insolvent person, to the prejudice and defeating of his other just and honest creditors, and of an infant heir and residuary

legatee; and that the executing a new bond to the defendant after the death of the Duchess of Marlborough, is only a continuance of the former transactions, and partook of the original fraud; and that, being an unrighteous and usurious bargain in the beginning, nothing which was done afterwards could help it; but on the contrary, defendant, on acquiring such new security and judgment, and thereby seeking to conceal the true transaction, did, as far as in him lay, add to the first fraud, and ought to be restrained from taking out execution on his judgment till the Court have first inquired into and determined upon the fraud; and therefore, it is prayed that the defendant may be adjudged by the Court to be a creditor of Mr. Spencer, only for such sums as he shall appear to have bonâ fide advanced, with interest from the time of advancing the same, after deducting what he hath received; and that he may be decreed to come in, and receive a satisfaction for the residue of such principal sums only, and interest, pari passu with Mr. Spencer's other creditors, according to the nature of his demand; and for an injunction to stay his proceedings at law till the hearing of the cause.

July the 21st, 1747, the injunction was continued upon the merits till the hearing.]

Mr. *Noel*, Mr. *Clarke*, Mr. *Wilbraham*, and Mr. *Crowle*, for the plaintiffs.

This case is of great importance to the estate of Mr. Spencer, but of greater to the public. The bill is to be relieved against an exorbitant, unconscientious demand, on the known terms in a Court of equity, payment of principal really advanced, and legal interest. There are three general points to be determined. First, how that contract would have stood if properly brought in judgment in a Court of law, and considered merely upon legal principles? Next, what the fate of it ought to be, in a much stronger degree, in a Court of equity, when examined by principles of equity? Lastly, the subsequent transactions relied upon in the answer as a ratification of the original bargain.

As to the first, it is not good in point of law, and therefore usurious. Oppression of this kind is almost of as ancient date as the use of money as a medium of trade, and usury of a much more innocent nature was against the principles not only of the canon law, but of the common law of the land. Lord *Coke* says, in 3 Inst. 151, that a man being found guilty of usury after his death, all his goods were forfeited to the crown; although it is now altered by several statutes, which confine it to such a quantum, allowing a certain moderate profit for the use of money: the difference, therefore, between usury and interest is, in specie, nothing but in gradu. Though the severity of the common law is changed, the nature of things cannot be changed. It was the constitution of this country, and is so, that no gain should be exorbitant on the loan of money; and therefore it is immaterial whether it falls within the statutes or no, but this case does. Where such a contract is originally for the loan of money, and exceeding the legal allowance, it is rescinded by the Act of Parliament itself, though attended in some measure with a chance, being construed a subterfuge and evasion of the act; for, if it may be extended to one life, it is difficult to tell where to stop. The legislature took a different method formerly; in the first acts describing minutely what species should be allowed, confining it to a direct loan of money for illegal gain, or sale of goods or merchandise to persons in necessity; the specifying whereof introduced endeavours to evade the particular kind of usury described. Therefore, the 21 Jac. 1, c. 17, is in general terms; in consequence of which, courts of law were vested with a kind of equitable jurisdiction, to consider the circumstances of the case, stated as particularly as in bills of this Court. The intent of the parties at the original communication is considered even by the courts of law as decisive; and where that is for a loan of money, or colourable sale of goods, whatever is thrown in of a different kind, it is usurious, otherwise not: *Reynolds* v. *Clayton*, Mo. 397, and *Becher's Case* there cited. Next, wherever security is taken for a larger sum than is

really advanced, it is usurious; unless the party may deliver himself therefrom by paying a less, or by doing some collateral act. The throwing something hazardous into the bargain, by which (as it is insisted) the lender might, in some event, have lost the whole, will not take it out of the statutes, and seems to have arisen from the statute 11 H. 7, c. 8, telling how far one might go to keep out of the acts: Mo. 397, and *Button* v. *Downham*, Cro. Eliz. 642; *Burton's Case*, 5 Co. 69; *Roberts* v. *Trenayne*, Cro. Jac. 507; *Cottrel* v. *Harrington*, Brownlow, 180; *Fuller's Case*, 4 Leon. 208, Noy. 151, 2 And. 15: and *Mason* v. *Adby*, Carth. 67, 3 Salk. 390, Comberb. 125. The only exception is the fœnus nauticum, or bottomry bonds; which, for the sake of the public and benefit of trade, are held not within the statutes of usury. The only view of the parties here was a loan of money, and security for double the sum advanced, subject to the contingency; the borrower could not deliver himself from the payment; and the Court will then lay everything else out of the case. In the calculation of lives, it is difficult to say where the true rule is: Halley and Newton have varied; but, on the first sight, one would think the lender had here greatly the advantage, from the disproportion; so that on the face of it, it would be deemed a subterfuge in a court of law. Suppose the bond existing, and an action brought by the defendant, after the grandmother's death, and the statute of usury pleaded; the parties may advance matters dehors; and it would be determined to be within the statute, which is very extensive, and, though penal, to have a liberal construction. The terms on which men communicate to borrow and lend, cannot alter the nature of the case. The quantum of the risk is not material, nor did the transaction proceed on the comparison of lives; or health, or constitution; but if it did, the defendant was satisfied of the contrary to what he now endeavours to support by proof, as to the constitution of Mr. Spencer.

As to the second point: Courts of equity, not being tied up to rules, consider questions of this kind in a more extensive manner, and in general have avoided laying

down any particular rule, as that would (like old statutes of usury) teach persons how far they might safely go; but declare, that wherever there is a spark of oppression—the motive on one side, necessity to apply for money, on the other, a covetous passion for undue lucre—they always relieve; not, indeed, setting it aside, but by giving what is really due. Their principles have been established gradually, and with deliberation; and, if one or two judges, who presided here, have differed and been unwilling, they have at last been compelled by the force of precedents and the growing evil. There were many cases for relieving against unreasonable bargains in case of young heirs in the time of Lord Ellesmere, Bacon, and Coventry. The first case afterwards is *Waller* v. *Dalt*, 1 Ch. Ca. 276; which was introductive of *Barny* v. *Beak*, 2 Ch. Ca. 136. In *Berny* v. *Pitt*, 2 Vern. 14, Lord *Jefferies* held, there was no difference, whether it was for money or wares; that the first thing prohibited by the statute is for the loan of money, and that of wares put secondarily only; and reversed Lord *Nottingham's* decree, who had not been long in this court when he took that distinction. In *Birney* v. *Tison*, 2 Vent. 359, Lord *North* affirmed the decree, though he showed an unwillingness, by adding ne trahatur in exemplum. In *Batty* v. *Lloyd*, 1 Vern. 141, Lord *North* dismissed the bill. In *Nott* v. *Hill*, 1 Vern. 167, he would not relieve, and reversed Lord *Nottingham's* decree; but, on a bill for specific performance of the same agreement, 1 Vern. 271, he seems a little to remit that rigour he had at first, and would not countenance the practice. But *Lord Ardglasse* v. *Muschamp* (*a*), where there was both a risk and confirmation, shows he had entirely got the better of it, from the force of precedents. Other cases were before Lord *Jefferies* and Lords Commissioners, 1 Vern. 467, 2 Vern. 77, 78, 121, 402. So, *Twistleton* v. *Griffith*, 1 P. Wms. 310. In *Curwyn* v. *Milner*, 3 P. Wms. 293, n., Lord *King*, though he seems, like Lord *North*, to have brought legal notions into this court at first, yet relieved. In *Lawley* v. *Hooper*, 19th November, 1745 (*b*), an annuity

(*a*) 1 Vern. 237.

(*b*) 3 Atk. 278.

of 200*l.* was charged on the estate of an elder brother, as a provision for the life of a younger, who, when in distress, granted 150*l.*, part thereof, to Davenant for 1050*l.*, seven years' purchase, with a proviso, that the vendor might repurchase on notice ; but there was indorsed, that it should be on paying 75*l.* more than originally advanced : your Lordship held it a mortgage and redeemable ; and that the 75*l.* more, when the thing was the worse for the wear, made it unfair. The principle on which the Court has gone in these cases is an unconscionable bargain ; and, it being contrary to public convenience to encourage it, such contracts are generally founded in oppression, by taking advantage of the borrower's necessity, which is the general ground of the malignancy of usury ; they are of public mischief, by encouraging extravagance of young men. If stopping the progress of it, as a growing evil, be thought for the public good, and no real inconvenience in laying an embargo on this sort of trade, this is nodus dignus vindice. These contracts are generally by persons having an expectation only. Men thereby pledge their estates before they have them, consequently before they know the value. It is too true, that men generally have not so much regard to creating reversionary inconveniences, when they consult present gratifications ;— know not how to estimate what they never felt the benefit of, by which their estates, like their pleasures, are gone before they enjoy them ; and several poor creditors commonly fall with one of those prodigals. There is no remedy immediately, by our law, against this extravagance, as by the Roman law by curatores, interdicting a man not of understanding sufficient to manage his own property, from the use thereof. This extravagance has established a trade of annuities and post-obits, universally exclaimed against. The ruin of a man who falls into this method, is declared not to be far off ; he ruins his estate without spending half ; for a borrower on post-obits never puts it out to interest, and many of these are purchased at above half. Our sons may at this moment be doing the same, and all we have laboured for may be gone just after our

death. It is on the principle of public utility that Courts of equity have gone further than the law. So, from the general inconvenience, præmiums for places are not allowed, because there the office falls to the man; not that he is fit for it, but the office fit for him. So in marriage brocage bonds, the first of which was *Hall* v. *Potter* (*a*), it is not for the sake of the party seeking relief; or bonds to have so much a year out of a particular office; or by clients to agents pending suit, although the party to whom it is given appears meritorious; or by a young man just after twenty-one to his guardian. In *Shepley* v. *Woodhouse* (*b*), 17th March, 1742, a bond by a man and woman to intermarry in thirteen months after her father's death, and for a reasonable settlement—the woman above thirty, and living in her father's house—the Court went on public inconvenience, as tending to deceive and encourage disobedience to parents. The cases are not confined to young heirs; young remainder-men are as much the object; and the opinion of Lord *Talbot* was, that the relief of this Court should be extended to meet such contracts; they are grown into a sort of stated traffic, which tempts young men farther than their vices. Lord *King* indeed said, if this was res nova he might have had some difficulty; and it may not be easy to draw the line. If a young heir wanted to portion a daughter, or a sum to put into trade, buy books, or for such occasions, equity might not interpose; but where it is to feed extravagance, the Court will stop there. The same set of men are generally employed in such contracts; and a catalogue of some of their fortunes is nothing but pieces of ruin out of several families. No proof of fraud or undue advantage is requisite: the case speaks for it, and otherwise it would be saying, the Court will not relieve at all, as to such secret transactions witnesses are not called in. It is unjust and unreasonable, and in that light a Court of equity calls it a fraud, arising from avarice on one side, and distress on the other; and will relieve on the same principles as in *Sir Thomas Meere's case*, 1 Vern. 465. So by Lord *Talbot*, in *Bosanquet* v. *Dash-*

(*a*) Show. P.C. 76, 1 Eq. Ca. Ab. 89.

(*b*) 2 Atk. 535.

wood, Ca. t. Talb. 40. That it was not sought by the defendant, will make no difference; the proposal generally coming from the person in distress. The defendant could not be ignorant of it, or of Mr. Spencer's expectation and dependency on his grandmother; his own witness, Richard Backwell, saying that it was hawked about that Mr. Spencer wanted money on those terms; and the necessity of concealing it from her, made him a slave to the person with whom he treated. It is literally true, that he was neither young nor an heir; but he was not old enough to manage his affairs. Twistleton was thirty-four (*a*); yet was his conduct relieved against. It is not generally in the case of heirs, though called contracts with young heirs; for an heir cannot sell a reversion: though he may estop himself by fine, he cannot grant. Mr. Spencer was quasi hæres, expectant though not apparent: the Duchess in loco parentis; and his dependency on her, from her constant declarations, a parental dependency, and known so to be by the defendant, who on that expectation built this contract. The contract itself, as well as witnesses, prove his necessity. The bare applying to pay two for one has been held sufficient. "Poor" and "rich" are relative terms: and however large a man's estate, if he cannot pay a debt, he is literally necessitous; and otherwise he never would have granted on post-obits, or risked his expectations on such terms. Comparing the ages, the defendant cannot be said to run any risk: and the defendant has not shown that the contract moved on a comparison of the health of each: nor is there any certainty in judging, on these cases, of lives.

(*a*) See *Twistleton* v. *Griffith*, 1 P. Wms. 310.

As to the *third* point, all the other acts of Mr. Spencer were, when under the like circumstances, as originally, proceeding from his inability to do more. His acquiescence cannot be considered a ratification, but may be excused by his looking on it as a debt of honour and a sort of wager. The bond and judgment are an evidence he could not pay; he would go as far as possible; no money could be raised but by annual rents, whereas an immediate

payment was to be made ; and the borrower is a servant to the lender. Like *Curwyn* v. *Milner* (19th June, 1731), 3 P. Wms. 293, n., and *Wiseman* v. *Beake*, 2 Vern. 121, and *Lord Ardglasse* v. *Muschamp*, 1 Vern. 237, where stronger instances of confirmation did not avail. So, in some of the prize causes in the Exchequer, some repeated confirmations were held rather an aggravation. *Cole* v. *Gibbons*, 3 P. Wms. 290, differs materially from this ; for there a person under no distress, renounced a relief he might have had.

Although the contract is usurious in law, the proper way is to come into equity to stop this species of traffic, which is of public inconvenience ; no act of Parliament could be made to meet this evil, nor any rule that would not be inconvenient in particular cases. The policy of law and equity in this kingdom does nothing more than what has been done in other ages and nations, as appears from the Macedonian decree ; Digest, lib. 14, tit. 6, "Law," 1, &c., where, though the words are filius familias, it shall not be confined to that. There ought, therefore, to be relief, on payment of the real principal and interest.

Mr. *Attorney-General* (Sir *Dudley Rider*), and Mr. *Solicitor-General* (Mr. *Murray*), for the defendant.—This is indeed a matter of importance, being a question whether a man's own act, without fraud, in full senses, and having the absolute disposal, shall bind him. If (as has been argued) there was no other way in which the Court could assist the preservation of families from ruin, it is better the law should be wrong in itself, than uncertain. So far as a Court of equity can prevent such destruction by general rules, it will lay down such rules, but will not endeavour to preserve a weak or wicked man ; nor say, that by the rules of equity an honest and wise man cannot be protected in his honesty and wisdom.

The question of law must arise out of the fact ; the particular question of equity must depend on the fact also, considered under all its extensive circumstances, taking in the convenience and inconvenience, but still the ground to go upon must be made out by evidence.

It will hereby be shown that this is a fair, honest, and honourable contract.

The circumstances come under these heads—first, the character, situation, and figure of life of the obligor; secondly, the same as to the obligee; thirdly, the motive or reasonableness thereof, inducing the obligor to solicit such a bargain; fourthly, the manner of transacting and concluding; fifthly, the fairness and equity of the price, from the chance, under all the circumstances, according to the probability at the time and the event, that has happened; sixthly, the opinion the obligor always had of this.

As to the *first*, it is material in all cases. His understanding is not charged by the bill to be weak, or likely to be imposed on, or that he was imposed on. He was turned of thirty; no heir of any sort, in which the term is applied in these subjects; for if one, living with his father, is considered as heir (although nemo est hæres viventis) he had no father, but was himself father of a family: he was in no state of quarrel with any relations; known never to have gamed, which, it is proved, he hated; and he had given up some former extravagances, and lived more temperately; was his own master; possessed of a fine family seat, with furniture suitable to his rank and figure; 7500*l.* per annum for life, beside present personal estate, contingent reversions, and hopes from his grandmother. The pressure on him for his debts of 20,000*l.* (it appears not how contracted) was from tradesmen. Justice obliged him to pay them; it would be scandalous not to do so, and prudence required it, lest it might alter his grandmother's opinion of him. He must have paid this by the annual profits, joint or single annuities for his life, or selling his personal estate, reversion, or the chance he had from his grandmother: and this would have been, probably, the opinion of the best and wisest friend he had. None would advise the selling his personal estate, family pictures, &c., which would be declaring himself bankrupt. The annual profits would not do it, nor would his creditors wait without impatience

for it. As to annuities (the way taken by a tenant for life who wants money for particular purposes), it certainly is not a beneficial way of contracting. It has appeared frequently, that if a man sells an annuity for his own life, so that he wants to sell it, the price is about seven years' purchase, supposing him of middle age and in good health; if he was to buy an annuity for his own life, the same man gives fourteen or fifteen, and in 1743 they went so far as to give sixteen or seventeen, which is a great difference. If there is any objection to the life, they make him abate in proportion. Taking it in the common way, he would get but 7000*l.* for 1000*l.* per annum; taking in the objections to his life, perhaps not 5000*l.* If he was to sell his reversion in fee, or the reversion of 10,000*l.* (the interest of which he had for life), if he had no younger children, he could have sold them for little advantage; nor could he have got anything for his chance under Lord Sunderland's will. Then his only chance to raise money was this, and it was the most reasonable way, if fairly done and on reasonable terms; and otherwise his goods might be taken in execution and sold for little value, as generally happens.

Next, for the circumstances of the defendant, who is not charged in respect of his character, behaviour, or manner of dealing; as, in securities to women, their character must be charged and proved. It would have been material also that he had been acquainted with Mr. Spencer (the contrary of which is proved, as far as a negative can), or a companion in creating the debt and encouraging it. All circumstances, weighing in other cases, are clear of this. The defendant is not a person looking out for young men to prey upon; he did not think it a beneficial contract, and absolutely refused it; but afterwards accepted it, on particular application and pressing. Mr. Spencer himself, in private, fixed on what he thought the fair price, and does personally, and by agents, propose these terms to any who would buy; which were refused by several, only because not advantageous.

The motive has been observed on already.

As to the manner, it is proposed, in the first moment, as a conditional bargain. If it turned out against the defendant, there was certainty of a loss: if for him, they might live so long as that there would be a very improbable chance of gain. No undue advantage is taken, for what is proposed is simply accepted.

As to the equality of it as a bargain of chance, whoever deals in or buys lives must have regard particularly to the constitution of the person, manner of life, and age. If the life is bad, the company will not insure at all: all circumstances must be considered, and it is enough to go on probable opinion. The bargain supposes an inequality in their lives, that the grandmother was most likely to die first: she was of good health, and took care of it; Mr. Spencer the contrary, from his course of life. The insurance offices always go on opinion, and inquire into a general account; so that, if a false account is given in, actions are frequent in Guildhall for the fraud. It is proved, that, notwithstanding advice, he would not alter his course, and said he did not desire to live longer than his constitution would let him. In all these chances, if a man has gone through such shocks to his constitution as he did, they deduct two years' purchase. It was the opinion at that time that he was a bad life; and it appears negatively that it could not be insured at 5*l.* per cent. Taking it on the event, she lived six years after; he survived her but twenty months. Supposing his life was insured at 5*l.* per cent., which is the insurance in case of a person in the best health, on a computation of the value of lives and terms for years, the defendant is gainer about 3000*l.*, and might have absolutely lost it, if she had lived many months longer. Interest of the interest, which would then be lost, must be made in all computations. It is so as to the burdens to be borne between tenant for life and reversioner, which is rather too favourable to the tenant for life. The defendant has proved, that none would give that, or so much as he did: the plaintiffs have proved nothing of that, which would have been

material to show the value of the contract. The disproportion, then, of the risk will not make it a bad contract: nor does this Court consider bargains in the nice scale of exact quality; nor adopt the rule of the Roman law, by which, if a bargain was one-half under value, it was set aside.

Lastly, his subsequent acts—as paying part, writing the letter himself to confess judgment, and taking every step after her death to carry it into execution—would not, perhaps, be of much weight if they were not consistent with his private opinion: his declarations in private being that he was honourably and fairly dealt by. The judgment was freely given, and not complained of afterwards; so that, if it could have been set aside originally, it cannot now; and, being in his senses, he might have released any demand. A release in terms of all his right to set it aside would have operated in point of law. Then is it not so in equity? A release, indeed, may, like any other contract, be set aside in this Court; but that must be on new imposition in obtaining the judgment. Things did not remain in the same situation, for now the money became absolutely due; nor was he under the same necessity; and might have disputed it then. In *Cole* v. *Gibbons*, 3 P. Wms. 290, the contract had not a possibility of being fair; yet there was no relief, because it was confirmed with open eyes. In *Standard* v. *Metcalf* (November, 1734), the plaintiff lived with the defendant, her uncle, and soon after coming of age was prevailed on by him to settle her estate upon herself for life, remainder to her issue in tail, remainder to her uncle and his heirs: she afterwards became a lunatic. The transaction was thought on the face of it to be hard, and an imposition by the uncle, acting as guardian, there being no consideration, nor any occasion for it, not being for marriage: on a bill to set it aside, the defendant insisted it was fair, and that, after the settlement, she by will, to which he was not privy, had given the estate in the same way. Lord *Talbot* thought it an extraordinary contract, and unfair, though no proof of fraud, and said, if it depended on the settle-

ment only, he should have relieved ; but the will had confirmed it, which took off that ground to set it aside : on appeal it was affirmed, with this variation only, that as the bill was by the committee it ought not to bind the lunatic, but should be without prejudice to her, if she should become sane, and seek to set it aside. The will did not operate there, but only showed a confirmation. So, but in a stronger degree, does the subsequent act here.

As to the use, in fact, to which this money was applied, it is not material to the defendant to show that, having advanced it bonâ fide ; but what materially distinguishes this from other cases is, that it was applied to the payment of the borrower's tradesmen.

To consider *next* the question of law—whether this contract, as it stood originally upon the bond, is void at law. If so, it is indeed putting it on a clear foundation. Mankind will have a rule for their property, and know the construction of the statute ; and it will be needless to argue as to the consequences in this Court; for one cannot, with his eyes open, make an agreement contrary to that statute. As a bargain for a contingency, there is no objection ; for all sorts of contingencies are the subjects of a legal contract. Any objection, then, to this, must be on the Statute of Usury, which is not frequent in a Court of equity. No contract is a contract on usury within the statutes which was not so before them. By the common, taken from the canon, law, a notion long prevailed, that it was not lawful to take an interest for the use of money, which prevails in Roman Catholic countries to this day ; and it is astonishing how they should think money might not be a commodity to be used as well as any other. This notion kept that commerce out of the world. In France, they let out money to interest in another shape. Lord *Coke*, in 3 Inst., labours hard to show, that taking any interest is contrary to nature, and endeavours to prove it also contrary to the law of Moses ; but the age is grown wiser, and the law is altered. Any sort of premium was usury ; now, an illegal premium only. Premium is a word more extensive than interest ; and usury is taking

a higher premium than the law allows for the use of money. The statute 37 Hen. 8, c. 9, is an act against usury, fixing the rate of it; which has been followed by the legislature until 12 Anne, st. 2, c. 16, and the rate of interest varied; and the sense of all the statutes may be taken together. Perhaps it may be a doubt, whether it is for the public good to have any law fixing the rate of interest, or that it should be like other commodities at market (*a*). Locke's treatise upon the consideration of reduction will, at least, make that doubtful. But it must be taken on the statutes, which comprehend only contracts on usury. There must be a principal sum due, and a rate of hire for the use; if it exceeds the proportion fixed, the security is void, and no artificial contrivance shall evade that law: therefore, on pleading the Statute of Usury, it may be proved by any collateral evidence, where it appears not on the face of the contract. Where there is no principal and rate of forbearance, the statute relates not to it. At common law, therefore, when usury in general was forbidden, a contract on condition or peradventure was not within it. *Hawkins*, C. 82, never disputed as to this point: where the principal may be hazarded really, it cannot be usury. Contracts on bottomry are not excepted out of the statute, yet are clearly not within it from the nature of the contract, the contingency of the ship's returning. So, the discounting notes or bills of exchange is not within the statute, no principal being due which is forborne: so, the buying up of securities at a low rate on the estate of a third person, of which more than legal interest may be made, is not within the statute; so, a wager at odds, which is, *Button* v. *Downham* (*b*): so, of casual bargain, *Bedingfield* v. *Ashley* (*c*); so *Fountayne* v. *Grimes* (*d*), and *Long* v. *Wharton* (*e*). Insurance, interest or no interest, is barely a wager, and not within it, according to *Doddridge*, J., in *Roberts* v. *Trenayne* (*f*), and *Sharpley* v. *Hurrel* (*g*). Yet none of these cases but may be turned into such a shift as may be brought within the statute, if that is the truth of the agreement; as in bottomry, if it be a mere evasion

(*a*) The laws against usury were abolished by 17 & 18 Vict. c. 90, and 24 & 25 Vict. c. 101.

(*b*) Cro. Eliz. 643.

(*c*) Cro. Eliz. 741.

(*d*) Cro. Jac. 252.

(*e*) 3 Keb. 304.

(*f*) Cro. Jac. 507.

(*g*) Cro. Jac. 208.

and no risk. Where the principal is secured, no contrivance can exceed the rate of interest, which, being forbid absolutely, is forbid on contingency. The cases cited for the plaintiffs prove only, that, where it is but a nominal risk, it is a mere shift and evasion ; as in *Clayton's, &c.* (*a*), where the demurrer admitted the corrupt agreement, and there was no objection to the pleading. A stress is endeavoured to be laid on words in determining a question of property, from the word "loan," &c., made use of in this case. If it is a loan within the Statute of Usury, it is material ; but a contract on usury is not a loan in its nature, a loan being that which is gratuitous. It is true, there is a difference between a loan not consumed by using, and a loan which is consumed. The first, as of a horse, is called "commodatum ;" for lending is not understood to be letting it, if not consumed : the other is to be repaid in weight and measure, and is called "mutuum ;" but in its original was gratuitous. But the Court always goes to the substance. What is a loan in its nature cannot be made a purchase by calling it so, nor e contra. This never was proposed in the nature of usury, the original communication being for this contingent bargain : no principal was due, nor rate for forbearance ; which they cannot be from the nature of the contract. In bottomry it is called a loan, but not therefore usurious ; and there is no difference between this and bottomry, which is admitted to be a hazardous contract, and good ; not because it is for the benefit of trade, but that a material risk is run, and to be paid for. So that it turns on this, whether it is a fictitious, colourable contingency to evade the statute ; for if it is so it is void, otherwise not. If no bargain can be made of a contingency on a life but what is within the Statute of Usury, it will be a proposition understood by every one. Suppose an action brought, and a plea put in ; this could not be considered as a nominal contingency, and to evade the statute.

(*a*) 5 Co. 1.

Next, whether this Court can set aside this legal contract upon arguments of conscience arising out of the case, and that in the utmost latitude. The proper juris-

diction of equity is, indeed, to take every one's act according to conscience, and not suffer undue advantage to be taken of the strict forms of positive rules. As this is only a ground of equity, it may indeed be made out by any sort of evidence upon all the circumstances; and on all together the Court cannot say the defendant is guilty of misbehaviour (which is not charged or suggested), or say this ought not to stand. Here is no fraud or overreaching—no evidence from whence imposition is to be presumed; and the amount of the cases cited for the plaintiffs is, that the Court will relieve against fraud in this as in other cases.

But supposing these points against the plaintiffs, another and a very general question has been made of the first impression—viz. supposing the transaction good in law and conscience, yet this Court should, for the sake of making a rule, set it aside on principles of policy or political reasoning; for, on fraud, there can be no case in which this Court will not relieve. No political principle can be stated on which it should be set aside; therefore, such a ground of determination is impossible in this Court. There may be a difficulty to tell what sort of rule. It is admitted that no certain one can be drawn, because it would be dangerous when applied to particular cases; and it is, therefore, said, acts of Parliament cannot be made to meet cases of this kind. This Court does not exercise or assume a legislative power, but disclaims it, and never will make a law to set aside contracts on public principles out of that cause, if good in law and conscience, let the convenience or inconvenience be what it will. The contracts in Exchange-alley were all contingencies; yet it was necessary to have an act (*a*) to set them aside, although easily proved inconvenient to the public. So, of fair and equal wagers, an act of Parliament, 7 Anne, c 16, (*b*) was forced to interpose. So of gaming—money won at a fair hazard, without cheating; this Court never set it aside before the legislature interposed: so that political arguments are never taken into consideration. The contract of sailors, selling their shares before they knew

(*a*) 7 Geo. 2, c. 8, and 10 Geo. 2, c. 8, repealed by 23 Vict. c. 28.

(*b*) Repealed Stat. Law Rev. Act, 1867.

what they were, could not be set aside here (*a*). It is true, there cannot be a more wretched condition than to have the rule of property uncertain, misera servitus ubi jus vagum. Lord *Digby* says, "Set the mark on the door of the house, and let me know that it is wrong, or it is doing it ex post facto." Where the Court has gone upon public convenience, it has been in cases defined and ascertained, which it is admitted, this cannot be. It is a misfortune that accounts of Courts of equity are conveyed to the public in loose notes by persons not concerned in the cause, and mistaken, and that general rules are drawn from particular premises. The Court, in all the cases alluded to, has inferred a presumption; but in all, the presumption may be taken off; it depends on the evidence. If a trustee buys the estate himself, the evidence from his situation is sufficient; he has misbehaved, for he cannot be a check on himself, and does not act fairly; but the presumption may be taken off, as if he agrees openly and fairly with cestui que trust, or with the knowledge of this Court (*b*). So, in bonds to lewd women, getting security for nothing: she has grossly misbehaved, and the common presumption is, that she has taken an advantage; but that may be taken off. So, in marriage-brocage bonds: the defendant there has lain such a bias upon himself, that he cannot properly advise; has a power and distress over the party: this is evidence, unless taken off. So, in a private bargain, to give back part of the marriage portion, contrary to the public treaty, it is fraudulent, and a presumption arises of undue advantage, because the father may say he will not otherwise agree; but that may be taken off. Bargains for money, under which offices are procured from one who had the giving or recommending, have nothing to do with this; but there the presumption, from the misbehaviour, as the man cannot get the office without it, may be taken off, as where sold with the King's leave, as commissions in the army, or a sum of money may be paid out of the trust of an office, as in Mr. *Bellamy's* case. Another instance is, the setting aside securities to attornies pending the business, which

(*a*) But see *Rochford*, 1 Wils. 229; *Taylour* v. *Rochford*, 2 Ves. 281; *How* v. *Weldon*, 2 Ves. 516.

(*b*) See *Fox* v. *Mackreth*, and note, ante, p. 123.

(*a*) 2 Atk. 27, *Barnard.* C. Rep. 478.

was *Walmesley* v. *Booth* (*a*) (2nd May, 1741), where Japhet Crook, being prosecuted for forgery, employed the defendant to be his attorney, who was to get bail, money, and probably even evidence for him, and just then procured him to enter into a bond for 1000*l.*, for which there was no consideration but for services done. This a Court of justice would never suffer, but has relieved on principles of a general nature, that an attorney should not take advantage of his client's distress to get from him what he ought not. This Court and a Court of law will, without showing errors, tax an attorney's bill, though settled by the party himself, unless a great acquiescence, or some such matter; it was an unreasonable bargain, and the presumption was from his not being at liberty; but it has never been determined as a rule, that a bonâ fide attorney may not receive a gratuity over and above, pending the matter. Another rule insisted on is this, that mutual bonds to marry shall be set aside by the Court, though ever so

(*b*) 1 Atk. 287.

fair; yet in *Atkins* v. *Farr* (*b*) (February, 1738), your Lordship decreed relief on such a bond. That rule was

(*c*) 2 Atk. 535

taken from *Woodhouse* v. *Shepley* (*c*); but your Lordship there said, you gave no opinion what would be the case if the bond was entered into by two persons sui juris, without fathers, or emancipated, having fathers. The ground there was, not that the woman did not know of the bond, which she certainly did; she lived in her father's house, had nothing but from him; they met at night out of the house, and executed this bond; it was held a fraud and imposition on the father, who was made to believe the match was off: it was seducing her from his house, and encouraging her in disobedience: therefore, though she knew what she did, the Court relieved.

Lastly, as to the case of post obits, it is said, where sons, whether in remainder or otherwise, or filius familias, not having a fortune or emancipation of their own, are encouraged in riot and expense, the Court relieves, without evidence, from the particular purpose, because no son, in the life of his father, shall make such a bargain: but that is not the ground of relief, for that may be denied,

like all other presumptions; from the reason of the thing, it is the misbehaviour to persons under this description to share in riot and encourage disobedience; which appears from Domat, under the general title "Loan;" and in another place he says, that, on a bargain with filius familias, under such circumstances there may be relief, under such not; not saying but that a son might, for a portion, even when filius familias, do it. As to which an observation arises on the case determined by Lord *Nottingham*, who relieved against many of these contracts on particular evidence. Lord *North* thought he went too far; Lord *Jefferies*, that he did not go far enough, which is not to be wondered at; for, judging upon circumstantial evidence, they might draw different conclusions. Lord *Nottingham's* reasons, in manuscript, shew he did not think he was going on the general rule, that a son could not sell a contingency. The case is entitled *Berny* v. *Pitt*, 2 Ch. Rep. 396. Berny was drawn into several securities for money, to be paid after his father's death, who then was infirm, and kept alive by art; by some he was to pay five for one, and thus was involved in debts to 50,000*l.*, or 60,000*l.*, in all which he appeared to be circumvented and beset; most of the money pretended to be borrowed, being raised by delivery of wares, at an excessive price, as wine, hemp, &c., which could not be sold for a quarter of the price; but the plaintiff, from his necessity (his creditors being underhand procured to fall upon him), was willing to get money on terms against which he sought relief. Lord *Nottingham* first made him pay the principal borrowed, before he would give an injunction, but relieved him as to the rest at the hearing, because, he said, this infamous dealing ought to be suppressed. That the Star Chamber used to punish, and this Court ought to do it; and that no family could be safe if this was suffered. But Pitt prevailed, and the bill against him was dismissed, though he gained about three for one; for it was in the time of his father's health, three years before his death, without any circumvention or practice, upon an express agreement to lose the principal if

the son died in his father's life; which shews the ground of the determination—relieving against those defendants guilty of misbehaviour, yet thinking that a proper bargain might be made by the heir. Lord *Jefferies*, on the evidence of that case, when before him, laid a different stress, and relieved against Pitt also. From that time there is no case, until *Twistleton* v. *Griffith* (*a*), which turned on the particular fraud and circumvention. *Curwyn* v. *Milner* (*b*), as cited, is a determination against Lord *King's* opinion, that he thought himself tied down by precedents; but, if it had been entire, he might have been of a different opinion; and, in the note in 3 P. Wms., it is misstated "and" instead of "or." It is going a great way to say, there can be no case where a son could sell a reversion, where the presumption is taken off. Presumption is evidence but until the contrary proved. This is not the case of a son; but of one, master of his own property. Cujus dare, ejus disponere. The principle is too large, that this is to be set aside because of a want of money on one side, that holding in every bargain. Then, as to the prospect of gain on the other, it is a laudable motive, provided they act honestly. He was under no more necessity than any man may be presumed to be who sells his estate, and cannot therefore come into equity to set it aside, because he wanted money to pay debts, and would not otherwise have sold it. The ground of common recoveries is to enable people to discharge debts by sale of estates. If it is to be set aside as being an expectation from a grandmother, the Court must go into very minute circumstances. As to the Court's relieving upon general principles against annuities for the life of the seller, the Court never laid it down that such annuities simply were bad. *Lawley* v. *Hooper* (*c*), was on particular grounds; the plaintiff was in gaol at the time, and fraud infecting the whole; but the Court did not say, no annuity shall be allowed that a man sells for his own life; if so, there is an end of all insurances on lives. The reasoning in *Batty* v. *Lloyd*, 1 Vern. 141, was never contradicted. There would be great difficulty was one not allowed to sell

(*a*) 1 P. Wms. 310.

(*b*) 3 P. Wms. 293, n.

(*c*) 3 Atk. 278.

such things, and turn into money, but must starve ob hæredis causam. Contracts for contingencies have been admitted; *Beckley* v. *Newland*, 2 P. Wms. 182; and in *Hobson* v. *Trevor*, 2 P. Wms. 191, a contract for sale of an expectancy was even carried into execution. In *Whitfield* v. *Fausset*, 1 Ves. 387, 1750, a mere possibility was sold by the heir, nothing vesting in the life of the father and mother; and yet your Lordship decreed a further assurance by the heir; which, if an illegal contract, would not have been done. So, where an officer, going abroad, assigned his future pay (*a*), a bill was brought to stop the money in his agent's hands; it was argued, such assignments were not to be endured, because uncertain and against the public service, and should be discouraged, as spending one's estate before he has it; yet the Court thought every one might dispose of his property, and decreed it because not unconscionable, though that was a contingency and possibility; equity going further than the law, which allows as contracts, but equity as conveyances. But what is this public good which is not to be defined? Is the end proposed by this, that none shall spend above his annual income? That is not to be secured in human nature, or prevented. Though the Romans had that law, they were allowed to spend their estates. Is property to be locked up to another generation?—for that effect it will have, which is contrary to the principles of the constitution of the legal part of the government; the later books, perhaps for 200 years, giving a reason why the Statute de Donis (13. Edw. 1) is not to be kept and preserved, that mankind may apply their property to pay their debts; and judges have said, there is great inconvenience in people not being able to sell their own estates. Is the end proposed, that a man may raise money on easier terms if this is set aside? The consequence would be directly contrary. If one wants money, and a difficulty is laid upon contracting with fair honest men, he will go into the hands of knaves, who will make him pay for running the risk of the law, and insist on more, when it is understood that he could not make a contingent bar-

(*a*) See, however, *Stone* v. *Lidderdale*, 2 Anst. 533; *M'Carthy* v. *Goold*, 1 Ball & B. 389; *Davis* v. *Duke of Marlborough*, 1 Swanst. 74; *Osborne* v. *Williams*, 18 Ves. 379.

gain. This was not lent to feed riot, but to get rid of a pressure, which is a reasonable cause, and, therefore, no ground to set it aside on political motives. As the law cannot find out a general rule to proceed on, much less will this Court; and, in every case where equity cannot relieve, it is not fit to be relieved.

February 4, 1750-1, the Court delivered their opinion. Absente, *Willes*, C. J.

Burnett, J.—Upon the state of this case three points are made.

First, that the original contract is usurious, contrary to the statutes, as being a greater *premium* than the law allowed; and, if so, the new security will fall to the ground, as well as the contract itself.

Next, that, if not usurious, it is so unreasonable an advantage taken of necessity and future expectancy, as the Court is warranted to relieve against as an unconscionable bargain.

Thirdly, that if the Court is warranted to relieve against this, the new security will be considered as a continuance of the same oppression, and stand in the same light, though entered into after the event.

The other side insist that the original contract is a mere contingent bargain, and consequently not within either the intent or words of any statute. There are no circumstances of a destitute heir or person seduced from parental government; no practice, fraud, or surprise; and that the bargain is equal, taking into consideration the risk run of the principal: and, therefore, the Court is not warranted to relieve, even on the footing of the original bargain. But supposing the Court would relieve on that, yet there is no precedent (but to the contrary) of relief when the party has taken on himself to be a judge of the equity of the contract, and confirms it with his eyes open.

The case is new, and I shall endeavour to throw my thoughts into one connected light, and occasionally take in all the cases cited.

As to the *first* point, whether the loan of 5000*l.*, to be paid 10,000*l.* on the death of the duchess, if he survived her, but nothing if he died before her, is usurious, or a mere casual, contingent bargain. I hope I may be excused in calling it a loan; because, although, in a case where the capital is not in all events to be paid, the word may be improper in Courts of law, this Court at least has adopted the use of that word in respect of a mere contingent bargain—that of bottomry. If this contract be usurious, it must be either because it is contrary to express words of the statute, or an evasion out of it. It would be misspending the time of the Court to enter into the old notion about usury, and the condemnation of it by canonists, civilians, and some common lawyers, because all those expressions depend on a principle which is out of the present case. The common lawyers differ, there being great opinions either way. Lord *Coke* seems to call all usury unlawful: 2 Inst. 89; 3 Inst. 151; —but in Hard. 420, Lord *Hale* says, the *Jewish* usury only is prohibited by the common law, and the true spirit of usury lies in taking an unjust and unreasonable advantage of their fellow-creatures. But it must be agreed, that nothing is legally usurious that is not prohibited by stat. 37 Hen. 8, c. 9, which leading statute is followed by the rest; the 12 Anne, c. 16, varying from it only in reducing the legal interest: the cases determined on the first statute have been, therefore, always looked on as authorities on any of the subsequent. Therefore, to make a contract usurious within the express words of the statute, the reward must be taken for forbearance, or giving a day of payment; and whatever shift is used it will be usury, but not within the statute where it is otherwise. If, in truth, it was a sum advanced by way of loan, and the reward, in truth, given for forbearance, no shift will prevail. I shall better explain myself by the instances I shall put. Supposing there is a purchase of an annuity at ever such an under price, if the bargain really was for an annuity, it cannot be usury; but if the communication was about borrowing and lending, it may be usury within

To make a contract usurious within the express words of the statute, tho reward must be taken for forbearance, or giving a day of payment, and whatever shift is used it will be usury.

Purchase of an annuity at ever such an under price is not usury.

Secus, if it was a mere device to pay a loan with usurious interest.

the statute: and how? If, by reason of all the circumstances and of the communication, the exility of the sum given, the original contract being a borrowing and lending, the Court thinks the annuity was a mere device to pay the principal with usurious interest to evade the statute, this will be within the statute, though on the face of the bargain it appears ever so fair a sale of an annuity; the contrivance of the annuity, as the usurious reward of the loan of money, shall not evade the statute made for the benefit of mankind. This I take to be the sum and substance to be collected out of the several cases: Cro. Eliz. 27; 4 Leo. 208; Noy, 151; 1 Brow. 180; and 2 Lev. 7. So, a bargain on a mere contingency, where the reward is given for the risk, not for forbearance, will not be within the statute; but otherwise if the intent was to have a shift, which was Cro. Eliz. 642, 3. If, therefore, a man gives or lends money, not to be paid if the event should be one way, but double if the other, and it is uncertain which way it will happen, it is not within the statute, for the reward is given for the risk, not forbearance; but if, under colour of such an hazardous bargain, the real treaty is for a loan, with an usurious reward for that loan, and to evade the statute, the contingency inserted is of little moment, being no ingredient between the parties, the Court, or a jury, on the whole, may pronounce such a contract usurious, notwithstanding the colour of contingency, if they are satisfied the reward is given for forbearance, not for the risk—as in the adding a single life, which is a healthy life, if that life should survive half a year: so they might as well add a contingency, if any one of six persons was alive at the end of six months; and one of the cases is, if any one of three persons is alive at that time. The intent of the bargain is the material thing: if that was borrowing the money, it is within the statute, whatever colourable contingency inserted; and this is the sense of all the resolutions in the several cases: 5 Co. 69, 70; 2 And. 15; Mo. 397; and *Mason* v. *Abdy* (*a*). But where the principal was fairly and truly put in hazard, and such as none

Bargain on a mere risk or contingency not within the statute.

Secus if the contingency was a mere shift in evasion of the statute.

(*a*) Carth. 67.

would run for the interest the law allows, there is no case where it has been held within the statute. The slightness or reality of the risk seems to be the only rule directing the judgment of the Court: Cro. Eliz. 741, *Bedingfield* v. *Ashley;* and in 3 Keb. 304, *Long* v. *Wharton*, which, though inaccurately reported, seems to me good law. I cannot see two contracts bearing a greater similitude than this and bottomry. A life may be insured; so may a ship, which may sink the day after, so may the party die; one is as much an adventure as the other. It was endeavoured to distinguish bottomry from every contract upon this, that though above what the law allows upon a loan, yet bottomry contracts were established in favour of trade, there being a risk of the principal, and they being necessary for trade and commerce. But, whatever favour the Court may shew to such contracts, they will never establish them upon the destruction of a statute; and the principle of the Court thereon was, that the bottomry bond was not within the statute; nor could it be, for it is plain that a real risk was run, that the principal may never be payable; therefore, it cannot be given for forbearance, but grounded merely on the contingency, the risk. But as a colourable contingency, in case of a life annexed to the payment, may make that bond usurious, so will a colourable contingency annexed to a bottomry contract: as in a bond, if one out of twenty ships, bound from Newcastle to London, arrived safe, that would be a contingency thrown in to evade the statute, which would be too hard for such a bond; so, if such a contract is made, if the packet should return to Dover from Calais, at a season of the year in which there is no danger: and this I may say with the more security, as *Joy* v. *Kent*, Hard. 418, is an express proof of it, where a bottomry bond was sent to be tried, whether it was an evasion of the statute, which would not have been so if it could not have been an evasion. Indeed, Lord *Hale* throws out expressions very favourable to trade, but so inaccurate in that book that I do not think they could be such as came out of the mouth of so great a man. His

Bottomry bond not within the statute.

dictums, then, are of no authority. One of the first cases of bottomry which came in question was *Sharpley* v. *Hurrel*, Cro. Jac. 208. What the Court goes on there is the real risk of receiving less, which is cited again in *Roberts* v. *Trenayne*, 2 Roll. 47, and Cro. Jac. 508, which differed from the other. In *Soome* v. *Glen*, as in 1 Sid. 27, the resolution is founded on the real hazard of the principal, which cannot be within the statute. On the whole, therefore, I am of opinion, that this is not a contract founded in its origin upon usury, but a contingent bargain, and, consequently, within the express words or intent of none of the statutes of usury.

This contract is not usurious, but a contingent bargain, and consequently not within the statutes of usury.

The *next* point is, supposing it not a contract within the statute, whether it is not such an unconscionable bargain, obtained of an expectant upon his expectancy, as the Court is warranted on precedents to relieve, on paying the sum advanced, with interest from the time of advancing. If it was necessary to give an opinion upon this, I own I should have great difficulty. On one hand I should apprehend it would be too large to say, in no case an heir or expectant could borrow money on his expectancy; and yet to let him borrow without any advantage to the lender seems to put him under difficulties; fathers being frequently close-handed, though liberal enough at their death: so that an heir, if hindered from supporting himself by these means, might starve in the desert, within view of the land of Canaan. On the other hand, I should dread the consequence of giving the sanction of this Court to future bargains. Lord *Cowper* states the inconveniences of a sanction which had been given. I am sure, it is a point of that consequence to the welfare of mankind, that without necessity no Court will give an opinion of which an ill use may be made. For the plaintiff it is insisted, that there have been many contracts not illegal or iniquitous in some circumstances, but, from the universal ill tendency on the prejudice to the public, have been always set aside in this Court: instances of which were in marriage-brocage bonds, and other contracts of like nature; and that the ill tendency of heirs

Whether the contracts ought to be set aside in equity as an unconscionable bargain, obtained of an expectant upon his expectancy.

contracting with strangers to furnish their wants is to make them quit a regular family life and dependency, to withdraw from advice and counsel of friends, and to have youth supplied with the means of gratifying their passions, and the bringing people together on the worst principles on which men may contract—avarice on one side, and a craving appetite on the other. The greediness of gain is the only principle on which a stranger can be induced to furnish a stranger; and the occasion of applying to a stranger is, because the wants are such as he would not reveal to his family; which tends to a delusion in what is of general concern, the provision for posterity. A man may be giving his estate to a money-lender instead of the person intended; and everyone disguising the truth from a man who has a right to the truth is wrong, and ought not to be encouraged; and by this delusion he gives his estate to strangers, when he thinks he is giving to his heir or relation, and when, if he had known the truth, he would have provided for that heir or relation, so as to prevent his beggaring himself. This has been a growing practice to supply young heirs, and the Court has extended its remedy. At first the cases are, where there is express proof of gross practice or actual imposition; from thence it went to cases where, on the face of the contract, it was so gross and unreasonable a contract between the parties, that the Court, on presuming a man would not enter into it but by imposition, has relieved; of which one case among many is *Nott* v. *Hill*, 1 Vern. 167. As the mischief increased, the Court has extended its remedy. Where the bargain is so lucrative, and the person under necessity, so that the judgment of the Court has been, that necessity alone could induce to make that contract, there has been relief: the first case of which kind is *Berny* v. *Pitt*, 2 Ch. Rep. 396; 2 Vern. 14, a very remarkable case, and a stronger there could not be. It is also stated by Lord *Cowper*, in *Twistleton* v. *Griffith*, 1 P. Wms. 310, where were marks enough of imposition to warrant relieving on that foot; but he chose to establish it on the general principle and Lord *Jefferies'* decree,

not on the particular circumstances of the case; and he seems to rejoice in the consequence, that this would put a difficulty on an heir to borrow on his expectancy. The last case is *Curwyn* v. *Milner*, 3 P. Wms. 293, n., where Lord *King* decreed relief; but said, if it was new, he would not have gone so far, where such a contract was fair, and done with open eyes; saying, he thought himself bound by precedents, and that he saw no difference between an estate settled on an heir at his father's death, and an expectancy of personal estate at the death of a relation: it is the same kind of expectancy that tempts to these kind of bargains, and the influence the same.

On the other hand, it is insisted, none of the particular cases cited come within the circumstances of this: that all those of fraud, practice, or imposition are out of the case, it being a bargain sent to market by the borrower, and the terms his own; no destitute heir under parental government having a great personal estate, and so not in the circumstances of the party seeking relief in other cases; the bargain itself different; the risk being different, and the bargain, in all its circumstances, so equitable, that, if the Court should enter into a nice examination of the proportion and risk, it would appear the defendant would have been out of pocket if the grandmother had lived a little longer: that this Court will not lay down a principle in general, that an heir or expectant may not contract on his expectancy: that there have been instances where such contracts have been carried into execution, as *Hobson* v. *Trevor* (*a*), and *Whitfield* v. *Fausset* (*b*): that it is a sufficient terror to such contractors, that they are always liable to the examination of this Court: and that they can never stand but on the reasonableness and justice of the contract, which will restrain one kind of men from preying on the follies of another. These are the arguments on both sides, and there would be danger and difficulty in giving an opinion on either; but there is no necessity for it, that being taken away by Mr. Spencer himself, who has made himself the judge, by voluntarily giving a new security.

(*a*) 2 P. Wms. 191.

(*b*) 1 Ves. 387.

Which is the *third* point, supposing the Court would relieve against this in its original, whether it will, when altered by the party in the strongest manner, not unapprised, and with his eyes open. There is no case of a contract so confirmed which was not illegal (but such as the Court would have relieved against in its original instance), where the Court has relieved against the confirmation; unless obtained by fraud or oppression, and then it has been considered as a continuance of the first oppression; of which there are two cases in Vernon—*Lord Ardglasse* v. *Muschamp* (*a*), and *Wiseman* v. *Beake* (*b*); but there is no resemblance to the present from either. There was no fraud, practice, or imposition in the original contract or subsequent security. The defendant was not very pressing for his money, the security not being given until a good while after; which shows no suit or distress was threatened, but fairly and voluntarily done, and upon intimation received that the defendant had a doubt whether he could make good the contract in a Court of equity. *Cole* v. *Gibbons*, 3 P. Wms. 290, and the note of the case at the bottom of that, is applicable to the present.

The contract being confirmed without imposition, not to be set aside.

(*a*) 1 Vern. 237.
(*b*) 2 Vern. 121.

As there is nothing, therefore, to set aside this contract on the foot of usury within the statutes, and next, supposing it was such as would be set aside if left to the consideration of the Court, yet as the party, with his eyes open, has bound himself to execute it, he ought to execute it. It is too much to set it aside; the penalty, therefore, is the only thing which can be relieved against in this case.

Sir JOHN STRANGE, M. R.—There is no occasion to introduce what I have to say with making a particular statement of the case; but as it depends on a variety of circumstances, many of which must be considered in the argument, I shall content myself with taking them up in the course of it.

The questions upon which I am to offer my advice are *three*.

First, whether the original advancement of the 5000*l.* in the manner as deposed by Mr. Backwell, and disclosed in the defendant's answer, and the bond taken upon it, are to be considered as usurious, and consequently void in point of law.

Secondly, whether, supposing the bond does not come within the Statutes of Usury, the transaction or bargain in 1738 is of such a nature as will entitle the plaintiffs to be relieved in equity on the circumstances attending that part of the case.

Thirdly, whether what appears to have been done by Mr. Spencer, after the death of the duchess, will in any and what manner influence the determination of this case.

The contract is not usurious.

As to the *first*, I concur in opinion, that this is not an illegal agreement made void by the Statutes of Usury. The prohibition will stand on the words and meaning of 12 Anne, c. 16 (*a*); for that does not materially differ from 21 Jac. 1, c. 17 (*b*); or 12 Car. 2, c. 13 (*c*); and appears calculated for such loans wherein two principal circumstances must concur—agreement to give and receive an allowance of profit in the mean time for the money hired, in a greater proportion than allowed by the statutes; neither of which circumstances occur in the present case. The repayment of the money advanced depended on a contingency, which, if it happened one way, the whole was totally lost; during the pendency of this, no interest or profit could accrue to the defendant, but a mere wager or bargain upon contingency which died first, so that the whole was at hazard. It is objected, that though the letter of the contract may be so, yet, if the design of the parties was to borrow the 5000*l.*, and one should give a greater use for the money than the law allows, putting it into this shape will not evade the statute, in which statute are very general words, to take in all covin, shifts, &c., which I agree to; and, therefore, if the Court can satisfy itself that this was not in reality a bargain, whereon the principal was designed to be at hazard, and the shape in which it was put was only a contrivance to evade the

(*a*) Repealed Stat. Law Rev. Act, 1867.

(*b*) Repealed Stat. Law Rev. Act, 1863.

(*c*) Repealed 17 & 18 Vict. c. 90, s. 1.

statute, it will be usury, and consequently void. Whether the agreement is usurious, or not, may be determined two ways: first, by verdict of a jury on a plea of the corrupt agreement; secondly, by the Courts exercising their own judgment on the circumstances of the case disclosed to them. The first of these methods could not be taken in this cause, because it appears the bond was cancelled upon giving the judgment after death of the grandmother, and therefore no action could be brought on it; and, if there had been a scire facias at law on the judgment, either against John Spencer or his executors, no plea of the corrupt agreement could be received; the judgment redditum invitum not being a contract or assurance, which are the words of the statute; and this was the opinion of B. R. in *Foot* v. *Jones*, Pasch. 9 Geo. 2; the other method has often been taken, as in *Roberts* v. *Trenayne*, Cro. Jac. 508. Thus, wherever the Court has seen that the contingency to put the principal in hazard is only added colourably, and only a nominal risk, the Court, to prevent an evasion of the statute, has determined it to be usury; as in *Clayton's case*, 5 Co. 1, and other cases, where the adding the contingency of a particular person being alive at the end of a year was only a shift. So, by *Holt*, Comb. 125, and Carth. 68. But a wager between two, to have forty for twenty, if one was alive at a future day, would not be usury: Cro. Eliz. 642, *Button* v. *Downham:* and in 1 Lut. 470, notice is taken of its appearing that both principal and interest were at hazard. The present case is fully before the Court, and proper for the exercise of their judgment. To say it is usury, the Court must be convinced that it was the design of the defendant to make a loan of this, and to secure exorbitant profit for it, and calculated as a shift to evade the statute. But I cannot think, either from the evidence or the answer of the defendant, that it was the scheme, or even in contemplation of the party. It appears a mere wager which of the two should outlive the other. The 5000*l.* was actually advanced, not colourably: therefore, none of the cases cited prove this to be within

the Statutes of Usury, or warrant the Court to declare it void thereon. The word "lend," on which some stress was laid, concludes nothing. Every advancement of money on bottomry is a loan, and it was properly observed to be called so in the acts of Parliament; but it is the nature of the agreement and intent of the parties into which the Court must look to determine the question. Cro. Eliz. 642, puts it entirely on the question, whether it was the intent of the parties to be a wager or a loan at interest. So in Mo. 398, it has been argued, that lending money on bottomry, when more is taken than the legal interest, is grounded on the consideration of the profit to trade; and, therefore, it is said not to be applicable. That certainly has been one reason why so large a profit for the use of money has been allowed in that instance; but the general reason has been, the not coming within the intent of the statute; for, if it had, the Court could not depart from it: but the hazard the lender runs, of never seeing a penny of his principal, or any of the interest, takes it out thereof; and that holds as strong in the present case; and is so laid down in general, where the principal and interest is in hazard: 1 Sho. 8, *Mason* v. *Abdy:* and in Sid. 27, a diversity is taken between a bargain and a loan, whether a hazard, or not, is considered as the rule for determining whether a bargain or loan. I am of opinion, therefore, this bond does not come within the Statutes of Usury, and cannot be declared void at law thereon.

Bottomry.

On the *next* question, as the advice I shall offer will be grounded entirely on what was done by Mr. Spencer after the death of the duchess, was I to suppose, for argument's sake, the plaintiffs were entitled to the relief prayed, I shall offer nothing as a determination of that branch of this case, though it may not be improper to throw out something in general. I see no reason to quarrel with the principal cases cited as the ground for the interposition of a Court of equity. On the contrary, I cannot help declaring I concur with those determinations, and do not mean in the least to abate the force of them. In the

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present case there are certainly many circumstances that cast a favourable light on the defendant's part of the transaction. He does not appear to be a person having an intent of fraud. The scheme (*a*) moved not from him, but from Mr. Spencer, on whose own terms the money was advanced without any haggling on the part of the defendant, after it was refused by others as not a desirable contract on the calculation of chances. Not that the hands of the Court are tied up from relief from the want of fraud or imposition. I have no jealousy of anything of that in this case. Yet cases may be wherein this Court would interpose to prevent improvident persons from spending or ruining their estates before they come to them, though no proof of actual fraud or imposition; which is agreeable to the saying of Lord *Jefferies*, in *Berny* v. *Pitt* (*b*), when he reversed Lord *North's* decree. So it was considered in *Twistleton* v. *Griffith* (*c*), and in *Curwyn* v. *Milner* (*d*). The necessity must be seen by every wise and considerate person. The Courts keep a strict hand over these agreements, which must, indeed, all stand on their own particular circumstances; and, perhaps, it is not advisable to lay down any general rule about them, or more than is necessary to the relief in each particular case.

(*a*) See also *Townsend* v. *Lowfield*, Belt's Supp. to Ves. 31. But it seems such a circumstance ought to have little weight: *Evans* v. *Cheshire*, Belt's Supp. to Ves. 300, 306.

(*b*) 2 Vern. 14.

(*c*) 1 P. Wms. 310.

(*d*) 3 P. Wms. 293, n.

Therefore, without offering any advice on the bond in 1738, abstracted from the subsequent transaction, I will proceed to the *third* question; upon which I am of opinion, that the plaintiffs are entitled to no other relief against the bond and judgment in 1744, but, as to the penalty, on payment of what remains due, and the interest from the death of the grandmother: and though I have given no opinion upon the former part of the transaction, yet I must take up this, as considering the plaintiffs entitled to the relief prayed, as the case stood on the first agreement. And here it is not improper to take a short view of the different situation in which Mr. Spencer appears in 1744, from what he was in 1738. When the first bond was given, he was, notwithstanding a large income, involved in great difficulty for want of money to

Confirmation of the contract.

pay creditors, casting about every way for a present supply, and suffering dangerous schemes to be privately hawked about, fearful lest it should come to his grandmother's ears that he was mortgaging his expectations from her. It is not very clear who took the first step toward the new engagement after her death; the bond was not given until near two months afterwards, though dated the next day after, in order that it might carry interest from thence. But supposing the defendant had called on Mr. Spencer for his money before the 31st of October (which, from his genteel behaviour in other parts, I can hardly think he did), yet there is no circumstance of force on Mr. Spencer; and the security then standing out against him, was only a bond for payment of the money, not a judgment on which immediate execution could be sued; which bond would have given him time enough to turn himself about, before he would be under a necessity to be exposed to an execution. It appears to be his fixed design, after her death, to pay off the whole as fast as he could, and that with a preference to the defendant, who, he said, had treated him like a gentleman. The defendant declared he would not press him for his money, although he should be glad to have it; and Mr. Spencer executed the bond and warrant of attorney freely and voluntarily, and well pleased therewith. It may be said that all this proceeded from his not being apprised that there could be relief in equity against the first bond. In *Cole* v. *Gibbons* (*a*), the bill for relief and the answer, were both read to the party, and yet the assignment was confirmed; which circumstance, greatly weighing with Lord *Talbot*, is not wanting in the present case; it is what the defendant himself may make use of on his part, and it will be evidence for him, viz., that he answered to the manager of Mr. Spencer that he doubted whether the security would be good, and therefore only desired a note or memorandum; so that, from this doubt of the defendant, Mr. Spencer was apprised of the possibility of relief he had, if he applied to a Court of equity; which shows he acted with his eyes open in this

(*a*) 3 P. Wms. 290.

article of confirmation—that it was not a sudden, but deliberate act, and agreeable to that frame of mind he continued in to his death, as appears from his subsequent letters.

Contracts of post obits are to be discouraged; and though the relief is not granted in the present case, yet should the Court hold a strict hand over these sort of contracts. How this would be in the case of a young heir under parental authority I do not say. It may be improper to forejudge such a cause; but inconvenience there can be none in the determination of this. Yet, in giving my opinion and advice in this very particular case against relieving the plaintiffs, I am far from blaming the plaintiffs, who are trustees for the infant, for submitting the case to the consideration of the Court, which I think very rightly done.

Lee, C. J.—The *first* point is, whether, on the evidence before the Court relating to this transaction, there is sufficient appearing to determine this contract to be usurious. As to the nature of usury, considering it at common law, or in the law of nature, or Divine law, or the civil law of other countries (of which there is a large account in Pal. 291), it is unnecessary to spend time on that subject, because the idea of usury is fully settled in this country by the legislature, which has made use of all the words the language could furnish to prevent taking more than the legal interest, in which usury consists; and, to attain this end, the borrower is at liberty to disclose every circumstance in his contract, that it might appear whether there was any shift, &c. It appears, by 2 And. 15, and *Mason* v. *Abdy*, Carth. 67, where the difference is taken and settled, that, where the hazard of losing the principal is but a colourable contingency, the agreement is usurious: but where the contingency is real and forcible, it is otherwise. I think that is the material consideration, and the substantial and true reason that bottomry bonds are not considered as usurious on the construction of the statute itself, there not being words

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Bottomry.

in the statute to reach bottomry bonds when they run a desperate contingency of winds, seas, and enemies, the reasons touching trade not being the true reasons, although they might be inducements to Courts to construe the statutes in a favourable way. So, if on advancement of money by way of loan, the lender will, by an agreement between the parties, in whatever manner formed, have the repayment of the principal, with profit exceeding the legal interest; that will be corrupt within the Statute of Usury. If, therefore, two persons speaking together, one desires 100*l.*, and for the loan will give more than the law allows, and for evasion of the statute a practice is invented that the borrower shall grant to the lender 30*l.* per annum for so many years, this practice is within the statute, and will be usury, although the lender never has his 100*l.* again; for by this bargain by way of loan he has full satisfaction for his 100*l.*, and more profit than the law allows; which is 1 Bul. 36, which brings the present case to the single consideration, whether the hazard the defendant ran of losing the whole principal, without satisfaction for the money advanced, was not a real hazard, which might require a reward beyond the legal and common interest: and where that is the case, it appears, from all the authorities, that all bottoms on this in Courts of law—that it is always thought, where the profit the lender is to have is as a reward for the hazard he is subject to, and not for the forbearance of the day of payment (which are the words of the statue), they are not usurious. In Molloy, 314, 317, it appears these real contingencies are not within the Statutes of Usury on this foundation.

These hazardous bargains are unconscionable.

But, on the *second* point, I think it will be well worth the consideration of a Court of equity whether they will not interpose in case of these hazardous bargains to pay double so as to prevent the lenders going away with such an exorbitant gain. It is difficult to form any general rule that can meet every case of this kind that may happen; but they must in general be governed by the circumstances in each case: only this may be always proper

to be attended to, as far as may be, to bring all contracts that are in the nature of loans to that mean prescribed by Parliament, that none take more than the legal interest; and by the cases cited and stated in Courts of equity, it appears they have used a sagacious attention to discover whether there is any fraud expressed, or, from the nature of the transaction or person concerned, anything carrying on the face of it an appearance of imposition; as, in the case of young heirs, &c., a Court of equity has disabled from taking advantage thereof, and interposed to prevent unconscionable bargains. That, therefore, is a matter worth the regard of a Court of equity, so as to prevent all trade of this sort, such as is called *Jewish* interest, which seems a malum conusable at common law.

Confirmation.

What has been done by Mr. Spencer, after the death of the duchess, prevents the Court from entering minutely into the consideration of the first contract; for any objections thereto are taken away by himself, in whose place the plaintiffs stand. The first contract, surely, might recover strength, and be validated by the intervention of a new case that was fit to create a right. If he was under apprehensions of his grandmother when the first security was given, yet they were at an end at the last. If he was an infant when he gave the first bond, the contract would be voidable as to him; but if, when of full age, he gave a new bond, it would be good against him. In the case in Dom. 136, called the Macedonian decree (De Senatu Consulto Macedoniano, Dig. lib. xiv. tit. v. 1), it is said that if any creditor lent money for a just and reasonable cause, sufficient to support the equity of the obligation, it was by a favourable interpretation of the decree of the senate excepted from the general prohibition, according to the quality of the use to which the money was put. The defendant has this exception in his favour—the use of his money being to pay just debts to tradesmen; for if these contracts are to be set aside upon the hatred to the creditor who has made an improper loan, yet that imputation is taken away: and even in the case of a son, if the father approves or ratifies the obligation by paying part, or the

son acquits it himself, it cannot be revoked: Dom. 137, 138, in his observations upon that decree. But it is said, that though Mr. Spencer was not under the same difficulty when he gave this new security as at the giving the first bond, yet he was a debtor then to the defendant, and liable to be called on by legal proceeding; but that cannot be a reason to set aside this deliberate act of Mr. Spencer, against whom there was then no process, but a readiness in his creditor to take paper security instead of money, which he had a right to. I rely on 3 P. Wms. 290 (*a*), as a stronger case than this, being a deliberate act confirming an unreasonable bargain when the party was fully informed of everything, and under no surprise: that made it good. In *Cann* v. *Cann*, 1 P. Wms. 727, Lord *Macclesfield* says, there is no colour to set aside a release which the maker had a right to make, and was not ignorant of his right, and that solemn conveyances are not slightly to be blown over. I entirely concur, therefore, in opinion.

(*a*) *Cole* v. *Gibbons.*

Lord Chancellor Hardwicke.—Before I proceed to give my own opinion in this case, I must take notice that Lord Chief Justice *Willes* has signified to me his entire concurrence on these three points.

Next, that the great and able assistance I have had in this case has made my task extremely easy; and, as I concur in the decree I am advised to make, the great pains taken in clearing up and considering the points might have excused me from taking up any time. One thing I ought to say in the outset—that if I could have foreseen upon what particular point the judgment in this case would fundamentally turn, I should have spared the judges the trouble of this attendance. As three points have been properly made at the Bar, it is necessary to say something to each.

Contract not usurious.

The *first* is a mere question of law upon the Statutes of Usury (*a*) and on the rules of law, and the same as in a Court of law, if an action had been brought on the bond, and the whole matter had been disclosed in special pleading.

(*a*) The laws against usury are now abolished. See 17 & 18 Vict. c.

If I had even now a doubt concerning it, I should have held myself bound by the opinion of the judges, as a matter within their conusance, in like manner as if I had sent this to be tried at law; in which case the Court always decrees consequentially to the trial. But I have no doubt about it, and concur in opinion. This question was laboured by the plaintiff's counsel; many authorities cited; strong inferences made by them. I do not intend to go through them; but contracts on contingency are to be distinguished plainly, for a wager on chance is not within the statute, because no loan. But if there is a loan of money, with an agreement to receive back more than the principal and legal interest in any event, there, though a contingency is thrown in, on which the whole principal and interest may be lost by possibility, it is usurious, and contrary to the statute. On this it was insisted for the plaintiffs. I will not now enter into a critical dispute how far any such contract, where, by the falling out of the contingency one way or other, the money may be lost, is in strictness a loan. The civil law has very nice and refined distinctions upon this; "commodatum" and "mutuatum" are there technical terms for a loan. By the first was meant, where the things lent were to be restored *in specie;* by the second, where *in genere* only: but in both the things were to be restored in all events, and nothing was to be paid for the use or hire; which, when it was so, was "locatum" and "conductum," by the Roman lawyers, under which, perhaps, all our laws would strictly come. But these minute distinctions upon loans are not adopted by us; but we mix and confound their "commodatum" and "mutuatum," as appears in an action upon a loan, which takes in both. So, though interest is to be paid for it, it is with us still a loan: so, though money is to be advanced upon a risk, which upon a contingency may be totally lost, it is still a loan of money; and all the books treating of bottomry call it money lent on bottomry. Besides, this is plain by the express words of the stat. 11 Hen. 7, c. 8, which shows they understood that an adventure might be inserted in a

90, and 24 & 25 Vict. c. 101.

contract of a loan; and it is observable that this, if real and fair, exempted it from the laws of usury; though at that time all kind of usury, or taking interest, was unlawful. By the law of England, therefore, the insertion of a contingency will not of itself prevent a contract being a loan. Consider the result of the cases cited on the Statutes of Usury, which I will not repeat, but only deduce proper and natural inferences from them. *First*, if there is a loan on contingency, in consideration whereof a higher interest than the law allows is contracted for forbearance, if the risk goes only to the interest or premium, and not to the principal also, though real and substantial risk is inserted, it is contrary to the statute, because the money lent is not in hazard, but safe in all events; and no regard is then had whether the contingency is real or colourable, as appears from what *Doddridge*, J., says in *Roberts* v. *Trenayne* (*a*); who, by the way, takes it for granted that such a loan may be with us on contingency. *Next*, if the contingency extends to both, and there is a higher rate than the law allows, regard is had, whether a bonâ fide risk is created by the contingency, or whether only colourable; for, if so, Courts of law hold it contrary to the statute, because it is an evasion to get out of the statute, which is prohibited by the law itself: *Clayton's case*, 5 Co. 70; and in the case put by *Popham* in *Burton's case* (*b*), immediately preceding. So in *Mason* v. *Abdy*. But where the contingency has extended to principal and interest both, and not colourable only, but a fair and substantial risk is created of the whole, it takes it out of the statute: though called a loan, it is considered as a bargain on chance, and differs little from a wager. On this depends the case of bottomry; for I agree, that the approving thereof is from their being fair contracts on a real hazard, and not that they concern trade; though trade and commerce are taken into consideration, but not alone relied on to support usury, for that cannot be. The plaintiff's counsel object to this, by laying stress on certain expressions and dicta of judges in some cases, that there must be no

(*a*) 2 Roll. 47; Cro. Jac. 508.

(*b*) 5 Co. 68.

Bottomry.

transaction or communication of borrowing and lending; and care must be taken that there be no such: and, therefore, as the first proposal in the present case was to borrow money on a contract to pay two for one, it is usurious, notwithstanding the contingency thrown in. A very right answer has been already given, that Courts of justice are to regard the substance of things on a contract, and not mere words, which might be inaccurately used by the parties in private dealing. But another answer may be given—that in the most accurate books these expressions are applied to cases arising on purchase of an annuity, or sale of goods and merchandise, at a premium or advanced profit beyond the rate of legal interest; in which cases these expressions are properly applicable, but cannot be so to loans on contingency—that is, a fair, real contingency; for there, from the nature of the thing, the communication must be about a borrowing and lending, as is plain from the case of bottomry; and the case put by *Doddridge*, J., in terms, is of lending 100*l.*, &c., upon a casualty: if it goes to the interest only, and not the principal, it is usury; which he clears by the case of bottomry. The very stating of the case on the purchase of an annuity or sale of goods proves the truth of this. An annuity may be purchased at as low a rate as you can, provided it was the original negotiation to purchase and sell an annuity; but if the treaty began about borrowing and lending, and ends in the purchase of an annuity, it is evident that it was only a method or contrivance to split the payment of the principal and usurious interest into several instalments, and consequently that it was a shift; which is *Fuller's case*, and *Tanfield's case*, 4 Leon. & Noy, 151, which I take to have been on the same deed as that in 1 Brownlow. So, in the sale of goods or merchandise, it is lawful to sell as dear as you can, on a clear bargain by the way of sale; but if it is first proposed to borrow, and afterwards to sell goods beyond the market, this is usurious; of which there are two cases in Mo. 397. The very putting these cases shows how proper and forcible those expressions of the judges before mentioned are,

when used in the purchase of an annuity and sale of goods; but how improper when thrown out in cases of loans of money on contingency.

Unconscionable bargains.

The *second* question is, supposing the first contract to be valid in law, whether it is contrary to conscience, and to be relieved against in this Court upon any head or principle of equity. I will follow the prudent example of not giving any direct and conclusive opinion. As it would be unnecessary, it is the safest not to do it; yet it has been made necessary to say something on it. It cannot be said that such contracts deserve to be encouraged, for they generally proceed from excessive prodigality on one hand, and extortion on the other, which are vitia temporis, and pernicious in their consequences; and then it is the duty of a Court, if it can, to restrain them.

Classification of fraud.

This Court has an undoubted jurisdiction to relieve against every species of fraud.

Actual fraud arising from facts and circumstances of imposition.

First, then, fraud, which is dolus malus, may be actual, arising from facts and circumstances of imposition; which is the plainest case.

Fraud apparent from the intrinsic nature and subject of the bargain.

Secondly, it may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other, which are inequitable and unconscientious bargains; and of such even the common law has taken notice: for which, if it would not look a little ludicrous, might be cited *James* v. *Morgan*, 1 Lev. 111 (*a*).

A third kind of fraud (*b*) is, which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that it must be proved, not presumed: but it is wisely established in this Court to prevent taking surreptitious advantage of the weakness or necessity of another, which

(*a*) This case is thus quaintly reported by Levinge: "Assumpsit de payer pur un chival, un Barly-corn a nail, et double every nail; et averr que la feuront 32 nails en less soliers del chival, que dublant chescun nail, veignant al 500 quarters de Barly. Et sur non assumpsit, le cause esteant try devant Hide al Hereford, il direct le jury pur donner le value del chival en damages esteant £8. Et issint ils fesoient et fuit apres move en arrest de judgment pur un petit fault en le declaration, que fuit over-rule: et judgment done pur le plaintiff.

(*b*) Fraud presumed from the circumstances and condition of the parties.

knowingly to do is equally against conscience as to take advantage of his ignorance; a person is equally unable to judge for himself in one as the other.

Fraud upon third persons not parties to the fraudulent contract.

A fourth kind of fraud may be collected or inferred, in the consideration of this Court, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement. It may sound odd, that an agreement may be infected by being a deceit on others not parties; but such there are, and against such there has been relief. Of this kind have been marriage-brocage contracts, neither of the parties herein being deceived; but they tend necessarily to the deceit on one party to the marriage, or of the parent, or of the friend. So, in a clandestine private agreement to return part of the portion of the wife, or provision stipulated for the husband, to the parent or guardian. In most of these cases it is done with their eyes open, and knowing what they do; but, if there is fraud therein, the Court holds it infected thereby, and relieves. So, where a debtor enters into a deed of composition with his creditors for 10*s.* in the pound, or any other rate, attended with a proviso that all creditors executed this within a certain period, if the debtor privately agrees with one creditor, to induce him to sign this deed, that he will pay, or secure a greater sum in respect of his particular debt—in this there can be no particular deceit on the debtor who is party thereto, but it tends to deceit of the other creditors, who relied on an equal composition, and did it out of compassion to the debtor (*a*). This Court, therefore, relieves against all such *underhand bargains*. So, of premiums contracted to be given for preferring or recommending to a public office or employment: none of the parties are defrauded; but the persons having the legal appointment of these offices are or may be deceived thereby: or if any person, agreeing to take the premium, has authority to appoint the officer, it tends to public mischief, by introducing an unworthy object for an unworthy consideration. These cases show what Courts of equity mean when they profess to go on reasons drawn from public utility.

(*a*) *Marc* v. *Sandford*, 1 Giff. 288; *M'Kewan* v. *Sanderson*, 15 L. R. Eq. 229, 20 L. R. Eq. 65.

To weaken the force of such reasons, they have been called political arguments, and introducing politics into the decision of courts of justice. This was showing the thing in the light which best served the argument for the defendant, but far from the true one, if the word "politics" is taken in the common acceptation; but if in its true original meaning, it comprehends everything that concerns the government of the country, of which the administration of justice makes a considerable part; and in this sense it is admitted always. To apply this: thus far, and in this sense, is relief in a court of equity founded on public utility. Particular persons, in contracts, shall not only transact bonâ fide between themselves, but shall not transact malâ fide in respect of other persons who stand in such a relation to either as to be affected by the contract, or the consequences of it; and as the rest of mankind, beside the parties contracting, are concerned, it is properly said to be governed on public utility.

Catching bargains with heirs, reversioners, expectants.

The last head of fraud on which there has been relief is that which infects catching bargains with heirs, reversioners, or expectants, in the life of the fathers, &c., against which relief always extended. These have been generally mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain; which was the particular ground on which there was relief against Pitt, there being no declaration there of any circumvention, as appears from the book, but merely from the intrinsic unconscionableness of the bargain. In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement. The father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark; the heir, or expectant, has been

kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief, and also reformation: this misleads the ancestor, who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand.

Consider which of these species is in the present case. There is no colour of evidence of actual fraud in the defendant, who did not think he was doing anything immoral or unjust; although, if the declarations of Mr. Spencer can be believed, the defendant had a misgiving how far it could be held good in this Court. But though this case is clearer of actual fraud than almost any that has come, yet several things are insisted on for the plaintiffs—as necessity on one side, and advantage taken of it on the other; unconscionableness in its nature, from the terms of paying two for one, in case of the death of an old woman, the next week or day; that there was deceit upon her, who was in loco parentis, from whom were his great expectations. This was, however, the thing intended. I admit, also, there are more circumstances alleged on the side of the defendant, to weaken and take off, than have concurred in most cases of this kind. Mr. Spencer was of the age of *thirty;* possessed of a great estate of his own; not weak in mind, but of good sense and parts—though in that the witnesses differ. If it was necessary to give an opinion upon this point, I should consider the weight of these objections, and the answers to them; but as it is not, I will only consider the contingency inserted, which was to cure the whole.

I would not have thought that the insertion of such a contingency would in every case sanctify such a bargain. Suppose such a bargain made by a son in the life of his father or grandfather, on whom was his whole dependency; I appeal to every one, what the consequence of it would be. Whether such a contingency is inserted or not, it will come to the same thing, the creditor knowing the fund for payment must depend on the debtor surviving the father or grandfather, whether it is said so or not; and

therefore I have always thought there was great sense in what Vernon reports to be said by the Court in *Berny* v. *Pitt*, "that the expressing the death of the son in the life of the father makes the case worse."

I have not mentioned the reasons drawn from the discouragement of prodigality, and preventing the ruin of families—considerations of weight, and ingredients which the Court has often very wisely taken along with them. It is said, for the defendant, to be vain and wild for the Court to proceed on such principles. If it had been said it was ineffectual in many instances, I should have agreed thereto; but I cannot hold that to be vain and wild which the law of all countries, and all wise legislatures, have endeavoured at as far as possible. The senate and lawmakers in Rome were not so weak as not to know, that a law to restrain prodigality, to prevent a son running in debt in the life of his father, would be vain in many cases; yet they made laws to this purpose, viz., the Macedonian decree (De senatu consulto Macedoniano Dig. Lib. xiv. Tit. vi.), already mentioned; happy if they could in some degree prevent it; est aliquod prodire tenus.

It is said for the defendant, that this would be to assume a legislative authority, and that several Acts of Parliament have been thought necessary to restrain and make void contracts of a pernicious tendency to the public. What can be properly called such an assuming in this Court I utterly disclaim; but, notwithstanding, I shall not be afraid to exercise a jurisdiction I find established, and shall adhere to precedents. As far, therefore, as the Court went in *Berny* v. *Pitt*, in *Twistleton* v. *Griffith*, in *Curwyn* v. *Milner*, and the opinion of Lord *Talbot* on the original transaction in *Cole* v. *Gibbons*, so far, and as far as these principles do naturally and justly lead, I shall not scruple to follow. The Acts of Parliament instanced will be found to be made (many of them), not for want of power in this Court to give relief in many of these contracts, but to make them void in law, to give the party a short remedy against them.

The judgment I am going to give will not be founded upon this: but I have done it that the work of this day may not be misunderstood, or precedents thought to be shaken: not that this establishes such a contract as is called fair, like killing fairly in a duel, which the law does not allow as an excuse for murder. Junct annuities and post obits are grown into traffic, which ought to abate of its fairness.

As to the *last* question, of the subsequent acts of Mr. Spencer: this is the point on which the determination of this case will depend, and I entirely agree with the opinion delivered already. Had the first bond been void by the Statutes of Usury, no new engagement would have made it better; the original would have infected it. But if a man is fully informed, and with his eyes open, he may fairly release and come to a new agreement, and bar himself of relief, which might be had in this Court. The material inquiry is, whether this was done, after full information, freely, without compulsion, &c.; and upon the best consideration of the evidence, it appears to be so done, and with fairness. Confirmation.

First, the condition of the necessity of Mr. Spencer was over: for though he had no power over the capital of this accession of estate, yet it was so great a one, that little more than one-third of a year's income would have paid off the whole. If that, then, be a state of necessity how far shall it be carried?

Then the state of expectancy was over by the death of the duchess, and also the danger of her coming to the knowledge of his conduct and circumstances, and his fear of offending her, which was the principal restraint upon him; so that there was no ancestor or relation left upon whom any deceit could be committed in consequence of any new agreement; and it appears, that, before this new bond he had sufficient notice that he had a chance, at least, that he might have relief in equity, from the defendant's own declaration to him of his doubt whether it would be good.

Lastly, there was no impediment against his seeking

relief by disclosing the whole case at that time in a court of justice.

Under these circumstances was the new engagement, without any fraud, contrivance, or surprise to draw him in, which operates more strongly than the deed of confirmation in *Cole* v. *Gibbons*, that it is too much to set it aside. The only difference to distinguish that from this case was, that there the releasor was not in the power of the releasee; here Mr. Spencer was debtor (*a*), and his creditor might immediately have distressed him by an action: but the answer is, there was neither an attempt nor threat to bring an action. It is objected further for the plaintiffs, that *Cole* v. *Gibbons* was a single case; and there are several precedents in which such new security and subsequent transaction were not sufficient to give a sanction to a demand of this kind, as in *Lord Ardglasse* v. *Muschamp*; but the circumstances there show it not to be at all applicable. Then the confirmation in *Wiseman* v. *Beak* was still more extraordinary: and that was a very extraordinary invention of Serjeant *Philips*, of a bill to be foreclosed against a relief in equity. In both those cases the original transaction was grossly fraudulent; but I have only shown it here to be a doubtful object of relief in this Court, which surely is the most proper case of all others to put an end to by a new engagement.

(*a*) See *Fox* v. *Mackreth*, ante, p. 154.

On the whole, therefore, the only relief is that which I am advised to give against the penalty of the last bond.

The only doubt which could arise on this is as to costs, to which the defendant is not entitled. The plaintiffs are only executors; they had a probable cause of litigating this contract, which is far from deserving favour, and were in the right to submit it to the judgment of the Court; and it is observable, that in *Cole* v. *Gibbons*, which was on this point, the bill was dismissed without costs, and no costs given on the bill, but, on the contrary, deducted. There was, indeed, in that case, no penalty, as there is here; but still that does not take away the discretion of this Court in respect of costs, according to

the circumstances of the case; and there are several cases of a bond with a penalty disputed, where, though the costs at law will undoubtedly follow the demand, yet, on the circumstances, costs in this Court are refused.

Therefore, let it be referred to the Master to take an account of the principal and interest due on the bonds of 1744, and the judgment thereon, and to tax the defendant his costs at law, and an account of the money paid by Mr. Spencer to the defendant; and let that first be applied to discharge the interest, and then to sink the principal, and all just allowances be made; and, on payment by the plaintiffs to the defendant of what is found due, let the defendant deliver up the bond to be cancelled, and acknowledge satisfaction on the judgment: but that must be at the expense of the plaintiffs. And, if the plaintiffs pay what is so found due, let there be no costs in this Court on either side; but, otherwise, let the bill be dismissed with costs. Decree.

Chesterfield v. *Janssen* is a case of very frequent reference, celebrated alike for the able arguments of the counsel on both sides, and for the opinions of the learned judges who assisted Lord *Hardwicke*, but above all for the elaborate and learned judgment of Lord *Hardwicke* himself, in which he has so admirably classified the different species of frauds against which equity will give relief.

It is proposed in this note to consider only the last head of frauds mentioned by Lord *Hardwicke*—viz., that which infects catching bargains with heirs, reversioners, or expectants. "These," observes his Lordship, "have been generally mixed cases, compounded of all or several species of fraud, there being sometimes proof of actual fraud, which is always decisive. There is always fraud *presumed or inferred* from the circumstances or conditions of the parties contracting—weakness on the one side, usury on the other, or extortion or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain. . . . . In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement. The

father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark; the heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief, and also reformation; this misleads the ancestor, who has been seduced to leave his estate not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand."

Before, however, entering upon this important subject, it may be remarked, that mere inadequacy of price, unless it were the result of fraud, surprise, or misrepresentation (*Pickett* v. *Loggon*, 14 Ves. 215; *Reynell* v. *Sprye*, 8 Hare, 222; 1 De G. Mac. & G. 660; *Summers* v. *Griffiths*, 35 Beav. 27), has never been a sufficient ground to set aside a purchase of *interests in possession*, unless the inadequacy were so gross as to be of itself clear evidence of fraud. "To set aside a conveyance," says Lord *Thurlow*, "there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it:" *Gwynne* v. *Heaton*, 1 Bro. C. C. 8; and see *James* v. *Morgan*, 1 Lev. 111; *Stilwell* v. *Wilkins*, Jac. 280; *Rice* v. *Gordon*, 11 Beav. 265; *Longmate* v. *Ledger*, 6 Jur. N. S. 481; *Haygarth* v. *Wearing*, 12 L. R. Eq. 320: *Tennent* v. *Tennents*, 2 L. R. Ho. Lo. *Sc.* App. 6; *Butler* v. *Miller*, 1 I. R. Eq. 195.

But, with regard to expectants (*Wiseman* v. *Beake*, 2 Vern. 121; *Cole* v. *Gibbons*, 3 P. Wms. 290; *King* v. *Savery*, 1 Sm. & Giff. 271) and reversioners (*Kendall* v. *Beckett*, 2 R. & M. 88; *Bawtree* v. *Watson*, 3 My. & K. 330; *Davies* v. *Cooper*, 5 My. & C. 270; *Edwards* v. *Browne*, 2 Coll. 100) (in cases not coming within the operation of the Sales of Reversions Act (31 & 32 Vict. c. 4), and the modifications in the law introduced thereby, which will be hereafter noticed), the authorities clearly show, even in the absence of the different species of frauds which, as before observed, are frequently ingredients in such transactions, that *mere inadequacy of price* was a sufficient ground for rescinding contracts or dealings with them for their expectancies or reversionary interests. Thus, where an heir borrowed money upon a post-obit bond or otherwise upon a mere expectancy, or sold it, a court of equity would set aside the transaction not only where it was unreasonable, but also where the price was inadequate: *Curwyn* v. *Milner*, 3 P. Wms. 293, n.; *Peacock* v. *Evans*, 16 Ves. 512; and see *Freme* v. *Brade*, 2 De G. & Jo. 582.

The rule was also applicable where the expectancy was an interest in remainder, after the death of the father or any other relation: *Freeman* v. *Bishop*, 2

Atk. 39; Barnard. Ch. Rep. 16. Thus, where a son, tenant in tail in remainder, has, during the life of his father, sold his interest in the estate at an under-value, the sale has been set aside. See *Nott* v. *Hill*, 1 Vern. 167; 2 Vern. 27; 2 Ch. Ca. 120; 2 Cox, 80, cited; *Twistleton* v. *Griffith*, 1 P. Wms. 310; *Edwards* v. *Burt*, 2 De G. M. & G. 57.

So, likewise, where a reversioner has mortgaged his estate, or has granted an annuity, or has given a bond or other security for the payment of a sum of money or an annuity at the death of his father, the transaction, if it appeared to be unreasonable or the price inadequate, would be set aside upon proper terms: *Barny* v. *Beak*, 2 Ch. Ca. 136; *Wiseman* v. *Beake*, 2 Vern. 121; 2 Freem. 111; 1 Eq. Ca. Ab. 91; *Berny* v. *Pitt*, 2 Vern. 14; 2 Swanst. 142 n.; 2 Ch. Ca. 391; 2 Ch. Rep. 396; 1 P. Wms. 312, cited; *Gwynne* v. *Heaton*, 1 Bro. C. C. 1; *Gowland* v. *De Faria*, 17 Ves. 20; *Evans* v. *Cheshire*, Belt's Supp. to Ves. 300; *Kay* v. *Smith*, 21 Beav. 522; *Smith* v. *Kay*, 7 Ho. Lo. Ca. 750; *Bromley* v. *Smith*, 26 Beav. 644; *Pennell* v. *Millar*, 23 Beav. 172; *Emmet* v. *Tottenham*, 10 Jur. N. S. 1090; 13 W. R. (M. R.) 123; 14 W. R. 3; *Re Unsworth*, 13 W. R. (V. C. K.) 488; *Tottenham* v. *Green*, 32 L. J. Ch. 201. But see *Benyon* v. *Fitch*, 35 Beav. 570, where the Court, under the circumstances, held the mortgagee entitled to the amount for which the mortgagor had given bills, and not simply to the money actually advanced upon them.

The application of the rule was not prevented by the fact, that the expectant heir was a person of mature age (*Earl of Portmore* v. *Taylor*, 4 Sim. 182; *Davis* v. *The Duke of Marlborough*, 2 Swanst. 143), nor that he perfectly understood the nature and extent of the transaction; nor is it necessary for the heir to show that he was in pecuniary distress at the time: *Bromley* v. *Smith*, 26 Beav. 644; *Salter* v. *Bradshaw*, 26 Beav. 161; *St. Albyn* v. *Harding*, 27 Beav. 11; *Foster* v. *Roberts*, 29 Beav. 467; *Emmet* v. *Tottenham*, 10 Jur. (N. S.) 1090.

A sale of a reversion, and a grant of a reversionary lease, stood upon the same principles: *Grosvenor* v. *Sherratt*, 28 Beav. 659.

Mr. Swanston, in his learned note to *Davis* v. *Duke of Marlborough*, 2 Swanst. 140, seems to think that, in order to constitute a title to relief, the reversioner must also combine the character of heir; and he observes, "that the reversionary interests, the sale of which had been rescinded for mere inadequacy of price, were expectant on the decease of a parent or other lineal ancestor in every case except the following:— *Wiseman* v. *Beake*, 2 Vern. 121; 2 Freem. 111; 1 Eq. Ca. Ab. 91; *Cole* v. *Gibbons*, 3 P. Wms. 290 (for the original transaction in

which, unconfirmed, Lord *Talbot* considered the plaintiff entitled to relief); *Barnardiston* v. *Lingood*, 2 Atk. 133; *S. C.*, Barnard Ch. Rep. 138; *Bowes* v. *Heaps*, 3 V. & B. 117;—they were expectant on the decease of the reversioner's uncle, and in *Gould* v. *Oakden*, 4 Bro. P. C. 198, Toml. ed., on the decease of the wife's father. But in all these cases the sale had been transacted while the vendor was in distress."

In nearly all these cases, it is true, distress actually exists; but the modern authorities show that, as distress or inequality is always *presumed* to exist, *the onus* (in cases not coming within the Sales of Reversions Act, 31 & 32 Vict. c. 4), *lies upon the person dealing with a reversioner or expectant*, even although he does not combine the character of heir, to show that the transaction is reasonable, or the price given adequate (*Gowland* v. *De Faria*, 17 Ves. 70; *Woodroffe* v. *Allen*, 1 Hay & J. 73; *Bawtree* v. *Watson*, 3 My. & K. 339; *Edwards* v. *Browne*, 2 Coll. 100; *Sewell* v. *Walker*, 12 Jur. 1041; *Davies* v. *Cooper*, and *Cooper* v. *Jackson*, 5 My. & Cr. 270; *Addis* v. *Campbell*, 1 Beav. 258; *King* v. *Savery*, 1 Sm. & Giff. 271; 5 H. L. Cas. 627; *Edwards* v. *Burt*, 2 De G. Mac. & G. 55; *Bromley* v. *Smith*, 26 Beav. 644; *Salter* v. *Bradshaw*, 26 Beav. 161; 28 L. J. (N. S.) Ch. 426; *St. Albyn* v. *Harding*, 27 Beav. 11; *Foster* v. *Roberts*, 29 Beav. 467; *Jones* v. *Ricketts*, 31 Beav. 130; *Sharp* v. *Leach*, 31 Beav. 491; *Talbot* v. *Staniforth*, 1 J. & H. 484, 10 W. R. (L. C.) 829; *Dally* v. *Wonham*, 33 Beav. 154; *Benyon* v. *Fitch*, 35 Beav. 570; (but the Court has directed an inquiry as to the value: Sugd. V. & P. 276, 14th ed.).

If the *bulk* of the property sold was reversionary, the mere fact of a *part* of it being in possession (especially if colourably thrown into the contract, and it bore but a small proportion to the whole), would not prevent the application of the rule of equity with respect to sales of interests in reversion: *Davis* v. *The Duke of Marlborough*, 2 Swanst. 154; *Earl of Portmore*, v. *Taylor*, 4 Sim. 182; and see and consider *Nesbitt* v. *Berridge*, 4 De G. Jo. & Sm. 54; 10 Jur. N. S. 53, reversing the decision of the M. R., 9 Jur. N. S. 1044; *Webster* v. *Cook*, 2 L. R. Ch. App. 544 n.; *S. C.*, on Appeal, *Ib.* 542, and the remarks thereon of Sir *J. Stuart*, V. C., in *Tyler* v. *Yates*, 11 L. R. Eq. 276.

It seems to have been thought at one time, that certain reversionary interests, depending for instance upon marriage and birth of issue, were not capable of valuation: *Baker* v. *Bent*, 1 Russ. & My. 224.

Subsequently, however, the Court would receive evidence with regard to the value of a reversion affected by such a contingency, and if it were very remote, no

deduction would be made on account of it in estimating the value of the reversion. See *Baker* v. *Bent*, 1 Russ. & My. 224; *Davies* v. *Cooper*, 5 My. & Cr. 270; *Boothby* v. *Boothby*, 1 Mac. & G. 604; 15 Beav. 212. See also *Whichcote* v. *Bramston*, 4 Sim. 202, cited; *Sherwood* v. *Robins*, 1 Mood. & Malk. 194.

The fact, however, that the reversion depended upon contingencies that could not be valued by actuaries, would not relieve the purchaser from the burden of showing that the full value was given: *Talbot* v. *Staniforth*, 1 J. & H. 484; *Woodroffe* v. *Allen*, 1 Ha. & Tw. 73.

Although, as a general rule, before the passing of 31 & 32 Vict. c. 4, the onus lay on the purchaser of a reversionary interest of showing that he gave a fair value (*Lord* v. *Jeffkins*, 35 Beav. 9), yet when the vendor had stated in his proposals the value of the corpus of the property, it lay upon the vendor to allege and prove that the value was understated: *Perfect* v. *Lane*, 3 De G. F. & Jo. 369.

Equity will also give relief, especially in the case of an expectant heir, against usurious loans, effected under the mask of trading, where, instead of money being actually advanced, goods are supplied by a tradesman, merely for the purpose of being at once sold, and will in general set aside such transactions upon payment of what the goods produced upon a re-sale, and interest: *Waller* v. *Dalt*, 1 Ch. Ca. 276; *S. C.*, 1 Dick. 8; *Barny* v. *Beak*, 2 Ch., Ca. 136; and see *Barker* v. *Vansommer*, 1 Bro. C. C. 149, in which case a young man, immediately upon coming of age, and wanting to raise money, gave a bond for the price of some silks to be resold by him. "I take it," said Lord *Thurlow*, on setting aside the transaction, "as an advancement of goods, instead of money to supply his necessities. It is a question of more difficulty what is the sum of which the account is to be taken—whether the value of the goods, or the sum really made. In the case in Eq. Ab. 91, the Court thought proper to charge the person only with what he really made of the goods; and this is the proper rule, for the person advancing the goods knows they are not to be sold in the shop, but in the lump, at a different kind of market, and that what can be got for them in that way is all that will redound to the benefit of the party to whom they are advanced: this leaves out of the case the value they were of to be sold in the shop."

However, in *King* v. *Hamlet*, 2 My & K. 456, Lord *Brougham* refused to relieve against securities given by an heir in necessitous circumstances, for the *shop price* of goods taken to a large amount, and immediately sold to raise money, at a loss on the whole transaction of 60*l.* per cent. The

decision in this case was founded principally upon two propositions, which, if sustained by subsequent authorities, will form material exceptions to the doctrine of courts of equity as to the dealings with expectant heirs and reversioners. "Two propositions," said his Lordship, "I take to be incontestable, as applicable to the doctrines of this Court upon the subject of an expectant heir dealing with his expectancy, and as governing more especially the present question. First, that the extraordinary protection given in the general case must be withdrawn, if it shall appear that the transaction was known to the father, or other person standing in loco parentis —the person, for example, from whom the spes successionis was entertained, or after whom the reversionary interest was to become vested in possession—even although such parent or other person took no active part in the negociation, provided the transaction was not opposed by him, and so carried through in spite of him. Secondly, that if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not, in any respect, act upon it so as to alter the situation of the other party, or his property; at least, that, if he does so, the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing. Still more fatal to his claim of relief will it be if the father or person in loco parentis, shall be found to have concurred in this adoption of the repudiated contract. . . . The whole doctrine with respect to an expectant heir assumes that the one party is defenceless, and exposed, unprotected, to the demands of the other, under the pressure of necessity. It would be monstrous to treat the contracts of a person of mature age as the acts of an infant, when his parent was aware of his proceedings, and did nothing to prevent them. The parent might thus lie by and suffer his son to obtain the assistance which he ought himself to have rendered, and then only stand forward to aid him in rescinding engagements which he had allowed him to make and profit by." The judgment of Lord *Brougham* in this case was affirmed in the House of Lords, 3 C. & F. 218; but Lord *Lyndhurst*, in moving the judgment of the House, merely said that he saw no reason to dissent from the judgment of Lord *Brougham* in the Court below.

Lord *St. Leonards*, in his learned work on Vendors and Purchasers, p. 316, 11th ed., with great reason, questions the soundness of these propositions. "The first of these rules," he observes, "is supported by no previous authority, and as a general rule cannot, it is submitted, be maintained;

the knowledge of the parent may, under some circumstances, remove one of the objections to such a transaction, but the others might still remain. The son is entitled to be relieved, although his father may witness his ruin with indifference. *It is the son's equity*, although partly grounded upon public policy. In many cases the person standing in loco parentis, or from whom the spes successionis is entertained, or after whom the reversionary property is to become vested in possession, may be more than indifferent about the worldly prospects of the expectant heir. Even in the case of father and son, how frequently we find the expectant spendthrift only following his parent's example! The second rule, without the concluding qualification, could not be safely acted upon. In the case of goods substituted for money, and a security given over the buyer's reversionary property, the heir may offer to return the goods if the seller will relinquish the securities. If the offer is refused, and the heir then sell them (which is simply accomplishing the purpose for which they were bought), it would not be possible to maintain that he had forfeited any equity which he originally had to impeach the transaction." See, also, the reasons for the appellant, Sug. V. & P. 1084, 11th ed., and Sug. H. of L. 65. *King* v. *Savery*, 1 Sm. & G. 271; 5 H. L. Cas. 627; *Talbot* v. *Staniforth*, 1 J. & H. 484, 502.

The repeal of the usury laws and the Sales of Reversions Act (31 & 32 Vict. c. 4), as will hereafter be more fully shown (p. 654), has not altered the rules of the Court as to dealings with expectant heirs, and, accordingly, where an extravagant young man, entitled in reversion to an estate, and very much pressed for money, had shortly after attaining twenty-one given to a money-lender securities bearing an exorbitant rate of interest, they were ordered to stand as a security only for the sums actually advanced, and interest thereon at 5*l.* per cent. per annum: *Croft* v. *Graham*, 2 De G. Jo. & Sm. 155; and see *Tottenham* v. *Emmet*, 14 W. R. 3; *Barrett* v. *Hartley*, 2 L. R. Eq. 789; *Miller* v. *Cook*, 10 L. R. Eq. 641, 646; *Earl of Aylesford* v. *Morris*, 8 L. R. Ch. App. 484; *Howley* v. *Cook*, 8 I. R. Eq. 570.

What dealings with reversionary interests are unimpeachable.] — Family arrangements do not come within the rules relating to persons dealing with reversionary interests; as for instance transactions between father tenant for life and son tenant in tail (*Tweddell* v. *Tweddell*, T. & R. 13; and see *Heron* v. *Heron*, 2 Atk. 160; *Wallace* v. *Wallace*, 2 D. & W. 452), and in the absence of undue influence on the part of the parent, they will be binding: *Bellamy* v. *Sabine*, 2 Ph. 425; *Firmin* v. *Pulham*, 2 De G. & Sm. 99; *Willoughby* v.

Bridcoke, 13 W. R. (M. R.) 515, *Ib.* (L. J.) 1056; 11 Jur. N. S. 706; and see the notes to *Huguenin* v. *Baseley*, and *Stapilton* v. *Stapilton*, vol. 2.

The principle on which the Court has acted in discouraging mortgages, sales, and dealings with reversionary interests, has no application to a settlement by an heir in favour of his wife and children: *Shafto* v. *Adams*, 4 Giff. 492.

The sale of a reversionary interest by auction fairly conducted rendered it unnecessary for the purchaser to show that he had given an adequate price; for the principle of the ordinary rule was not applicable to this case, because as there was no treaty between the vendor and purchaser, there could be no opportunity for fraud or imposition on the part of the purchaser; the vendor was in no sense in the power of the purchaser; and, moreover, the sale by auction *was evidence of the market price*. This was first decided by Sir *John Leach*, V. C., in *Shelly* v. *Nash*, 3 Madd. 232, who, when it was urged that pretended sales by auction might be used to cover private bargains, observed, "where such cases occur, they will operate nothing."

Where, therefore, the sale by auction has taken place under such circumstances as to affect the purchaser with notice that he was dealing with a person in such distress that he did not use the ordinary precautions against a sale at an undervalue, the purchaser has been held not to be relieved from the obligation of proving that he gave a fair price. Thus, in *Fox* v. *Wright*, 6 Madd. 111, where a bill was filed to be relieved against certain post-obit bonds, Sir *John Leach*, V. C., said, "The true effect of the case of *Shelly* v. *Nash* is, that every purchaser at a sale by auction of a reversion is not necessarily bound to establish that he purchased at a full price—that he may purchase under circumstances which make it as equitable that he should have the benefit of his bargain, without such proof, as if he had bought not a reversion, but an estate in possession. The question is, whether the present defendant purchased this post-obit bond under such circumstances. The particulars of sale disclose that the vendor was a young man about to raise a sum of 40,000*l.* upon post-obit bonds, payable at the death of his father, and that the sale of these bonds was to take place *without reserve*—that is, without any bidding on his part. Those who attended this auction necessarily, therefore, knew that the vendor was a young man in distress; that he was so much pressed for money that he undertook, with those who thought fit to be bidders, that he would not have recourse to those precautions by which every provident seller at an auction protects himself against an inadequate price; and I have to ask myself, in the

language of the case of *Shelly* v. *Nash*, whether it can be considered that the vendor is not, in some sense, in the power of those who deal with him; and whether a sale by auction under such circumstances, affords fair evidence of the market price. At all events, the question in this cause is of too much importance to be decided incidentally upon this motion, and I must continue this injunction till the hearing, upon the terms of the plaintiff bringing into Court the auction price, together with interest at 5*l.* per cent. from the time of payment."

It was not, however, essential to the validity of a sale of a reversionary interest that it should be by public auction. "For if," as observed by Lord *Cranworth*, "previously to the sale of a reversionary interest, the vendor and purchaser concur in ascertaining from persons of competent skill and having knowledge of the property, and of all the circumstances likely to influence value, a well considered estimate of what the property would be likely to fetch on a sale, and act on that opinion, we are far from meaning to decide that such transaction could be afterwards impeached, merely because other surveyors should come to a conclusion different from that on which the parties had acted. The Court would probably in such a case be much inclined as a matter of fact to believe the original, and not the subsequent estimates to be correct:" per Lord *Cranworth*, L. J., 2 De G. Mac. & G. 63. And where a bill was filed to set aside a sale by private contract of a reversion, it was held that the highest bid for it upon a previous attempt to sell it by auction was a fair test of its market value: *Lord* v. *Jeffkins*, 35 Beav. 7.

And the fact that a reversionary interest had been offered to and declined by many persons may be a sufficient reason for the Court declining to set aside a subsequent sale for the same price. *Moth* v. *Atwood*, 5 Ves. 845; *Perfect* v. *Lane*, 3 De G. F. & J. 369; sed vide *Roche* v. *O'Brien*, 1 Ball & B. 330.

But where upon the sale by private contract of a reversionary interest in leaseholds, nothing was done except obtaining the opinion of an actuary acquainted with the local circumstances likely to influence the value, and in a suit to impeach the sale, the purchaser was unable to show that he had given the full value, the sale was set aside: *Edwards* v. *Burt*, 2 De G. Mac. & G. 55. And see *Edwards* v. *Browne*, 2 Coll. 100.

A lot purchased by private contract at an inadequate price may be set aside, although assigned by the same deed with a lot purchased by public auction: *Newton* v. *Hunt*, 5 Sim. 511.

The rule as to the sale of reversionary interests was not applicable to a sale of property by the reversioner and the person having

the prior interest; for the rule proceeds upon the notion, that he who has only a future interest to sell does not meet a purchaser upon equal terms, but if the person having the prior interest and the reversioner concur in selling property—if, for instance, the father tenant for life, and the son remainder-man in tail, concur together in selling estates, they form, in fact, one vendor, with a present interest, and meet a purchaser with the same advantages as if a single person had the whole power over the estates; the onus, therefore, would not lie upon the purchaser, of showing that he gave an adequate price. See *Wood* v. *Abrey*, 3 Madd. 422; *Wardle* v. *Carter*, 7 Sim. 490; *Cooke* v. *Burtchaell*, 2 Dru. & War. 165; *Sibbering* v. *Earl of Balcarras*, 3 De G. & Sm. 735, 736. But there may, notwithstanding the concurrence of the tenant for life, exist other circumstances in the case which might throw the onus upon the purchaser, to show that he gave an adequate price, as in the case of a purchase by an attorney from his client, or in the case of undue parental influence having been used: *King* v. *Savery*, 1 Sm. & Giff. 271; *S. C.*, 5 H. L. Cas. 627. See, also, *Hannah* v. *Hodgson*, 30 Beav. 19.

The rule, moreover, as to the sale of reversionary interests will not apply where the vendor is entitled to what was substantially an estate in possession, and the reversion subject only to an intervening life estate (*Wardle* v. *Carter*, 7 Sim. 490), nor where the contract was entered into between a tenant and the person entitled to the reversion and to the rents during the term: *Scott* v. *Dunbar*, 1 Moll. 459.

Where even before the Sales of Reversions Act (31 & 32 Vict. c. 4) came into operation, a person dealing with an heir or reversioner, showed that the transaction was reasonable, and that a fair price had been given, either for a reversionary interest, annuity, or post-obit bond, a Court of equity would not, in the absence of fraud, set it aside: *Dews* v. *Brandt*, Sel. Ch. Ca. 7; *Batty* v. *Lloyd*, 1 Vern. 141; *Wharton* v. *May*, 5 Ves. 27; *Curling* v. *Townshend*, 19 Ves. 634; *Lord Aldborough* v. *Trye*, 7 C. & F. 436.

It may be here mentioned, that a fair agreement between expectants or heirs, to divide the property which may be left between them, or to any one of them, is not contrary to public policy, and will be enforced in equity. Thus, in the leading case of *Beckley* v. *Newland*, 2 P. Wms. 182, the plaintiff, Beckley, and Sir George Newland, who had married two sisters, the presumptive heirs of Mr. Turgis, a very rich man, entered into articles whereby they agreed, that whatsoever should be by will left to either of them should be equally divided between them.

Mr. Turgis, who had made and revoked several wills, at length made a will in favour of Sir George Newland, whereby he left a great personal estate to Sir George. Upon a bill being filed by Beckley for a specific performance of the agreement, it was objected, that the articles to divide a man's estate while he was living, and to share that in which the parties, at the time of making the agreement, had no manner of right, and possibly might never have, were unfair, and not to be encouraged; that it was to disappoint the will of the testator, who in all probability would have given nothing to either of the parties to the agreement, in case he could have foreseen that his disposition would be frustrated as soon as ever he should die. However, Lord *Macclesfield* decreed a division of the personal estate, according to the articles. "Suppose," he observed, "there were two daughters, and the father should leave almost all the estate to the eldest, and nothing, or very little, to the youngest; if there should be such an agreement as in the principal case, surely it would have been no more than what every one would have wished for." See also *Wethered* v. *Wethered*, 2 Sim. 183; *Harwood* v. *Tooke*, 2 Sim. 192; *Hyde* v. *White*, 5 Sim. 524.

What constitutes inadequacy of price.]—There is no rule in our law as to what difference between the real value of the property and the consideration paid constitutes inadequacy of price; this the Judge must decide. By the *civil law*, a consideration which exceeded half the value of the property was adequate: *Baldwin* v. *Rochford*, cited 2 Ves. 517; *Nott* v. *Hill*, 2 Ch. Ca. 121, where Lord *Nottingham* says, "By the civil law a bargain of double the value shall be avoided," and wished it were so in England. See C. Lib. iv., Tit. xliv. l. 2.

In many cases sales of reversions were set aside for inadequacy where the difference between the assumed value and the price given was so very small (see *Edwards* v. *Browne*, 2 Coll. 100; *Edwards* v. *Burt*, 2 De G. Mac. & G. 62; *Jones* v. *Ricketts*, 31 Beav. 130; 8 Jur. N. S. 1198) as to draw from a learned Judge an observation to the effect that the tendency of the decisions was to establish that unless a person gave much more than the value it was impossible, save under a sale by auction, to purchase a reversionary interest with safety. See *Foster* v. *Roberts*, 29 Beav. 471.

As to the valuation of a reversionary interest.]—When it becomes necessary to consider the value of a reversionary interest, much difficulty arises from the conflicting evidence usually given—on the one hand, by auctioneers and surveyors, who estimate the value by

the *market-price;* on the other, by actuaries, who generally estimate the value according to the *tables.* It is, however, now fully established, that, in calculating the value of a reversionary interest, the Court will be guided, not by the tables, but by the market price; and in the case of real estate, its nature, position, and other particulars ought to be considered as affecting the value of the interest sold. See *Hinchsman* v. *Smith,* 3 Russ. 433; *Headen* v. *Rosher,* M'Cl. & Y. 89; *Potts* v. *Curtis,* 1 You. 543; *Newton* v. *Hunt,* 5 Sim. 511; *Wardle* v. *Carter,* 7 Sim. 490; *Ryle* v. *Swindells,* M'Cl. 519; *Edwards* v. *Browne,* 2 Coll. 100; *Davies* v. *Cooper,* 5 My. & Cr. 270; *Lord Aldborough* v. *Trye,* 7 C. & F. 436; *Bernal* v. *Lord Donegal,* 3 Dow. 133; 1 Bligh, N. S., 594; *Edwards* v. *Burt,* 2 De G. Mac. & G. 55, 57; *Perfect* v. *Lane,* 3 De G. F. & Jo. 369; *Tynte* v. *Hodge,* 2 Hem. & Mill. 287.

The value of a reversionary interest is always to be calculated with reference to the time of the contract, and not to the result; so that, although, in the events which may have happened, a large price has been given for a reversionary interest, the Court could not take that into consideration, if the price at the time of the contract was inadequate: *Gowland* v. *De Faria,* 17 Ves. 20, 25, *Boothby* v. *Boothby,* 1 Mac. & G. 609, 2 H. & Tw. 214.

The circumstance that a reversionary interest formed part of the subject of a Chancery suit, must be taken into consideration as involving a considerable deduction from the strictly calculated value of such interest (*Perfect* v. *Lane,* 30 Beav. 197, 3 De G. F. & Jo. 369): so must the costs of selling real estates. *Ib.*

The law as altered by the Sales of Reversions Act.]—The law relating to the sales of reversions has been altered by the Sales of Reversions Act (31 & 32 Vict. c. 4), which enacts, that "no purchase made *bonâ fide and without fraud or unfair dealing,* of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of undervalue. (Sect. 1.) The word 'purchase' in this Act shall include every kind of contract, conveyance, or assignment, under or by which any beneficial interest in any kind of property may be acquired. (Sect. 2.) This Act shall come into operation on the first day in January, 1868, and shall not apply to any purchase concerning which any suit shall be then depending."

The exception in the statute as to fraud and unfair dealing, leaves the law as to unconscionable bargains, as affecting reversionary interests, the same as it was before the statute came into operation. See *Miller* v. *Cook,* 10 L. R. Eq. 641. There the defendant, a money-lender, having

agreed with the plaintiff, who was just twenty-one years of age, and was in difficulties, to lend him 150*l.* on his reversionary interest under his father's will, exacted securities for 200*l.*, with interest at 20 per cent. reducible to 10 per cent. on punctual payment, and advanced only 123*l.*, but claimed interest on the whole amount secured, and there were immediate powers of sale on non-payment of principal and interest upon a certain day. The plaintiff, it seems, had been assisted by Mr. Ring, a solicitor, who, however, stated that he had not been accurately informed of the transaction. It was held by Sir *John Stuart*, V. C., that the transaction being unconscionable, the deeds executed by the plaintiff should only stand as securities for the moneys actually advanced with interest at 5 per cent. "As to the argument," said his Honor, "on the recent statute (31 & 32 Vict. c. 4, s. 1) concerning dealings with reversionary interests, the exception in the statute as to unfairness leaves the settled law as to cases like the present untouched. Nor is the case of the defendant assisted by the presence of Mr. Ring, who appeared as the plaintiff's friend. The evidence shows that the advice of Mr. Ring was founded on misunderstanding or misrepresentation. But there is a great difference between the intervention of a third party in transactions of this kind, and where there is no pressure of necessity which the friend cannot relieve. In transactions of bounty indeed, where the advice of a judicious and impartial friend may assist and regulate, and in transactions where the pressure, not of want and of necessity, but of a confidential relation between the parties, requires the impartial advice of a friend, the intervention of a third party is important. In the present case, besides the other objections to the contract, the terms of the powers of sale are oppressive, and put the plaintiff completely at the mercy of the defendant. The power to sell without any notice to the plaintiff enabled the defendant at any moment to extinguish the right of redemption." See, also, *Tyler* v. *Yates*, 11 L. R. Eq. 265, affirmed 6 L. R. Ch. App. 665, where Lord *Hatherley*, C., thus comments on the law relating to the sale of reversionary interests, and shows very clearly and concisely how far it has been affected by the Acts repealing the usury laws and by the more recent Act of 31 & 32 Vict. c. 4. "The appellants," said his Lordship, "have urged upon me that the Court must obey the law which has repealed the former laws with respect to usury, and I have been told that the Court is bound by the law which enacts that the sale of a reversionary interest is not to be set aside on the ground of undervalue merely. I am one

of those who believe that these changes in the laws are very wise in many respects. . . . The legislature, however, has not repealed, and I believe will not repeal, the doctrines of this Court by which protection is thrown round unwary young men in the hands of unscrupulous persons ready to take advantage of their necessities. This case has in reality nothing to do with the amount of interest charged, though it is difficult in these cases to avoid entering into the question of consideration. That question is, however, of the very smallest importance if the Court can find that these young men have been fairly dealt with. I conceive the reason why the law as to sales of reversions was altered to be that the doctrines of this Court had been carried to an extravagant length on that subject. The protection of the Court with regard to the sale of reversionary interests was chiefly given to expectant heirs of real property, and was gradually extended to persons who had reversionary interests of any kind." See, also, *Beynon* v. *Cook*, 10 L. R. Ch. App. 389.

With regard to the law affecting sales of reversionary interests, since the 1st of January, 1868, when 31 & 32 Vict. c. 4 came into operation, it seems that they cannot be set aside for inadequacy of consideration, unless it be so gross as to be evidence of fraud, and therefore within the exception of that Act. In other words, the law relating to the setting aside the sale of a reversionary interest is now assimilated to that relating to the sale of an interest in possession.

As to the terms upon which the sale of a reversionary interest will be set aside.]—Where any transaction with an expectant heir or reversioner has been set aside, on the *sole ground* of the inadequacy of the price, the Court, proceeding upon the well-known maxim "*that he who seeks equity must do equity*," have only given relief upon payment of the sum actually advanced, with interest, moneys expended by the defendant in lasting and valuable improvements on the premises, and costs (*Murray* v. *Palmer*, 2 Scho. & Lef. 490; *Salter* v. *Bradshaw*, 26 Beav. 161) *Twistleton* v. *Griffith*, 1 P. Wms. 310; *Gwynne* v. *Heaton*, 1 Bro. C. C. 1; *Peacock* v. *Evans*, 16 Ves. 512; *Wharton* v. *May*, 5 Ves. 27; *Curling* v. *Townshend*, 19 Ves. 633; *Bowes* v. *Heaps*, 3 V. & B. 117; *Evans* v. *Chesshire*, Belt's Suppl. to Ves. 312; *Fox* v. *Wright*, 6 Madd. 111; *Bawtree* v. *Watson*, 3 My. & K. 341; *Miller* v. *Cook*, 10 L. R. Eq. 641, 647;) except the costs of an unsuccessful reference as to value (*Boothby* v. *Boothby*, 15 Beav. 212, 214; *Edwards* v. *Burt*, 2 De Gex, Mac. & G. 55, 65; *Jones* v. *Ricketts*, 31 Beav. 130); but misconduct

on the part of the purchaser of a reversionary interest has been held to disentitle him to costs (*Baugh* v. *Price*, 1 Wils. 320; *Gowland* v. *De Faria*, 17 Ves. 20; *Moroney* v. *O'Dea*, 1 Ball & B. 109, and the reporter's note; *Wood* v. *Abrey*, 3 Madd. 417; *Bawtree* v. *Watson*, 3 My. & K. 339; *Tyler* v. *Yates*, 11 L. R. Eq. 265; so, where he has refused a larger sum for principal and interest before the suit was instituted, he has been compelled to pay the costs of litigation which he rendered necessary: *Benyon* v. *Fitch*, 35 Beav. 570, 578. But compound interest will never be allowed to the purchaser: *Gowland* v. *De Faria*, 17 Ves. 20.

It seems that the plaintiff must pay the costs of suit so far as they relate to charges of fraud or undue pressure not proved: *St. Albyn* v. *Harding*, 27 Beav. 11; but see *Tyler* v. *Yates*, 11 L. R. Eq. 265. And as to costs generally, see *Bromley* v. *Smith*, 26 Beav. 644.

On the other hand, the purchaser will be charged with what he has actually received and interest, but it seems he will not, like a mortgagee, be charged with what without wilful default he might have received: *Seton*, 639; *Murray* v. *Palmer*, 2 Scho. & Lef. 489; but see Decree, Ib. contra, 490.

Where money has been advanced at an exorbitant rate of interest upon the security of a reversion, the rate will notwithstanding the repeal of the usury laws (see *ante* p. 649) be reduced to 5*l.* per cent., and the deeds will be allowed by the Court to stand as a security only for the sums actually paid to the plaintiff with interest at that rate, but the defendant will be entitled to have his costs of the suit added to the amount found due on his securities. See *Miller* v. *Cook*, 10 L. R. Eq. 647.

Confirmation and acquiescence.] —Impeachable transactions, as in *Chesterfield* v. *Janssen*, may be rendered valid by acts of confirmation (*Cole* v. *Gibbons*, 3 P. Wms. 289), especially when of a formal character after advice taken (*Lyddon* v. *Moss*, 4 De G. & Jo. 104), as by will or deed: (*Stump* v. *Gaby*, 2 De G. Mac. & G. 623; or acquiescence for a great length of time (*Sibbering* v. *Earl of Balcarras*, 3 De G. & Sm. 735; *Addis* v. *Campbell*, 4 Beav. 401; *Lord* v. *Jeffkins*, 35 Beav. 7), on the part of a person who is cognizant of his right to relief; and see *Gerrard* v. *O'Reilly*, 3 Dru. & W. 414; for it has been well said, "that the presumption which a Court of justice most probably entertains against stale demands, can never be more properly applied than in a case where the burden of proof upon a most material point in controversy is thrown upon the defendant" (3 De G. & Sm. 737); but confirmation or acquiescence will be of no avail whilst the reversioner continues in the same

situation as when he entered into the contract, for in such cases it has always been presumed, that the same distress, which pressed him to enter into the contract, prevented him from coming to set it aside; it is only when he is relieved from that distress that he can be expected to resist the performance of the contract (*Gowland* v. *De Faria*, 17 Ves. 20; *Medlicott* v. *O'Donel*, 1 Ball & B. 156; *Kendall* v. *Beckett*, 2 Russ. & My. 88; *Edwards* v. *Browne*, 2 Coll. 100). See *Fox* v. *Mackreth*, ante, 146, and note, 175; and in *Curwyn* v. *Milner*, 3 P. Wms. 292, n., relief was given even after payment of the money due on a post-obit bond, the payment having been made from fear of an execution.

Where, moreover, a sale of a reversion has taken place at under value time will not begin to run against the vendor until the reversion falls into possession. See *Salter* v. *Bradshaw*, 26 Beav. 161, in which case the transaction was set aside after the lapse of forty years.

Where a transaction is not merely voidable or impeachable, but is absolutely void, upon principles of public policy, then, as is laid down by Lord *Hardwicke* in the principal case, it is incapable of confirmation. Thus, a usurious contract was, and a marriage brokage contract still is, void ab initio, and does not admit of confirmation: *Shirley* v. *Martin*, 3 P. Wms. 74, n.; *Cole* v. *Gibson*, 1 Ves. 506, 507.

It may be here mentioned that by the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), which came into operation on the 7th of August, 1874, it is enacted that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants, shall be absolutely void; provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity enter, except such as now by law are voidable." (Sect. 1.)

That "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." (Sect. 2.)

The 2nd section of the Act applies to ratifications made after the passing of the Act of contracts made before that time: *Ex parte Kibble, in re Onslow*, 10 L. R. Ch. App. 373; and see *Ex parte Lynch*, 2 Ch. D. 227.

MARSH *v.* LEE.

Termino Sanctæ Trinitatis, Anno 22, *Car.* 2.

[REPORTED 2 VENTRIS, 337.]

TACKING INCUMBRANCES.]—*If a third mortgagee having advanced his money without notice of a second mortgage, afterwards buy in a first mortgage or statute, though it be pendente lite, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee, having obtained the first mortgage or statute, and having the law on his side, and equal equity, he shall thereby squeeze out and gain priority over the second mortgagee.* *S. C.*, 1 Ch. Ca. 162. 3 Ch. Rep. 62.

A BILL in Chancery was brought by Marsh, and an answer put in thereto.

The case was thus :—One English, being seised of the manor of Wicksall and of the Manor of Monfield, in 1649, mortgages part of the manor of Wicksall to Burrell for 1000*l.* Afterwards, in 1655, he acknowledges a statute to Burrell of 800*l.*, for the payment of 400*l.*

Afterwards, in 1662, English mortgages both these manors to Mrs. Duppa, for 7000*l.*

Afterwards, in 1665, English mortgages the manor of Wicksall to Lee, for 2000*l.* ; Lee *having no notice of the former mortgages.*

[(*a*) After Mrs. Duppa's death, her executors brought actions of ejectment against English, and filed their bill of foreclosure against him. In Michaelmas Term, 1667, English suffered judgment in ejectment against him at the suit of the executors, with a cesset executio until May, 1668. The cesset executio having expired, English obtained an injunction against the proceedings at law, upon the judgment in ejectment, until hearing or another

(*a*) This statement within brackets is drawn up from 1 Ch. Ca. 162, where the proceedings in the case are fully given.

order; and on the 5th of June, 1668, a decree was made, that English should redeem within a twelvemonth, or be foreclosed. On the 26th of November, 1668, the Master reported, that 8530*l.* 14*s.* would be payable to the plaintiffs on the 6th of June, 1669.

On the 27th of November, 1668, Lee, by the advice of counsel, purchases in the two incumbrances to Burrell, viz. the mortgage of part of the Manor of Wicksall, and the statute.

On the 5th of February, 1669, the Master's report was confirmed. And now Marsh, executor of Duppa, sues Lee, who pleads this whole matter.]

My Lord Keeper, Sir *Orlando Bridgeman*, assisted by *Hale*, Chief Baron, and Justice *Rainsford*, held, that Lee might make use of these incumbrances to protect his own mortgage. For they said, that *he had both law and equity for him.*

First, he had law; for that he had a precedent mortgage in 1649 (which, indeed, was but upon part), and also the statute in 1655; so that, while these remained in force, Marsh could not come in.

Next, he had equity; for he having a subsequent mortgage, yet it *being without notice*, he ought to be relieved in this Court. And, therefore, my Lord Chief Baron put the case, as if the first mortgage had been of the manor of Wicksall to Burrell, and afterwards it had been mortgaged to Duppa, and afterwards to Lee, *not having notice;* if afterwards Lee bought in Burrell's mortgage, he shall hold the estate against Duppa, until he be satisfied for both the money which he paid Burrell, and also his own money lent upon the last mortgage: and for that he said, that it had been so adjudged in Camera Scaccarii, in the Court of Equity, since the King came in, in one *Shelley's case.*

Next, he put the case of the statute, which English entered in to Burrell, in 1655, and was afterwards bought by Lee from Burrell. He held, that Duppa shall not bring Lee to any account upon this statute here in equity, any otherwise than he may do at common law.

Nota. It was agreed that the lands were extended upon the statue at the third part of the true value. Now, at common law, the conusor, or he that claims under him, must bring a scire facias ad computand', as in the 4 Co. 69 b. But then the conusee shall not account according to the true value, but according to the extended value, and also for the whole statute: and if the conusee is satisfied by the extended value, the conusor shall recover; or if the conusor will pay down the rest of the money which is behind, with damages, he shall also recover. But if the conusor will sue the conusee in a court of equity, then he shall bring him to account for what he hath received of the profits above the extended value.

Now then our case here is somewhat more, for Lee has also equity on his side, and therefore Duppa shall not bring him to account for what he has received above the extended value, unless he has also received enough to satisfy his own mortgage of 2000*l.*, as well as the statute; and therefore, if Marsh will take off this statute by a suit in this Court, he must be content that Lee doth account upon the extended value for the whole 800*l.* and damages.

Secondly, they held, that whereas part of the manor of Wicksall was mortgaged to Burrell, but that now the whole manor was mortgaged to Lee, that yet the first mortgage should not extend to protect more than that part of the manor which was first mortgaged to Burrell.

And my Lord Chief Baron *Hale* put the case thus:— If a man is seised of sixty acres, and mortgages twenty to A., and then mortgages the whole to B., and then mortgages the whole to C., and afterwards C. purchases in the first mortgage, that shall not protect more than the twenty acres; but it shall protect those twenty acres so as B. shall never recover that, until he pay C. all the money upon the first and last mortgage.

But *Hale* said, that he thought that in this case, inasmuch as the mortgage to Lee (*a*) was only of part of Wicksall, that therefore Marsh might bring Lee to an

(*a*) That is to say the mortgage which *Lee* took as assignee of *Burrell.*

account upon the extended value, whereupon these two manors were extended upon the statute; and if Lee had received the money due upon the statute, by receiving of the profits according to the extended value, or if she will pay down the residue of the money due upon the statute, or if she will pay down so much as the proportion will come to for Monfield, that then she may discharge the manor of Monfield.

But then my Lord Keeper asked him how he would have it appointed (*a*), and how much should be laid upon Monfield, and how much upon Wicksall? for that part of Wicksall is under that extent.

(*a*) Qy. "Apportioned."

To which *Hale* answered, that if Marsh did sue Lee for the discharge of this statute from Monfield, that Monfield should be discharged by her paying down as much as the proportion comes to, or when Lee shall have received so much according to the extended value, and that he thought there might be a proportion found out by the Court.

Nota. Sir *H. Finch* (*a*), counsel for Lee, cited *Primate and Jackson's case* (*b*), *Grove and Grove's case* (*c*), and *Mrs. Calamy's case* (*d*), all which were resolved in this Court—That a purchaser or mortgagee coming in upon a valuable consideration, without notice, and purchasing in a precedent incumbrance, it shall protect his estate against any person that hath a mortgage subsequent to the first, though before the last mortgage, though he purchased in the incumbrance after he had notice of the second mortgage.

(*a*) Afterwards Earl of Nottingham.

(*b*) Hardres Rep. nom. *Hedworth* v. *Primate.*

(*c*) *Churchill* v. *Grove*, Nels. Rep. 89, 1 Ch. Ca. 35.

(*d*) *Higson* v. *Sydall, Calamy, and Others*, 1 Ch. Ca. 149.

Marsh v. *Lee*, the pleadings of which are fully stated in 1 Chancery Cases, 162, lays down the doctrine, never since allowed by the judges to be questioned, that a mortgagee, without notice, purchasing the first incumbrance, shall thereby protect his estate against any person having a mortgage subsequent to the first incumbrance, though he purchased in the incumbrance after he had notice of the subsequent mortgage. In *Edmunds* v. *Povey*, 1 Vern. 187, there were first, second, and third mortgagees, who had all lent

their money without notice. The third mortgagee, hearing of the two former securities, bought in the first incumbrance, a judgment that was satisfied; it was strongly insisted at the bar, that, though the trade of buying in incumbrances had been formerly countenanced, yet that it was in truth a thing against conscience, and contradictory to many established rules of law and equity. But, after long debate, the Lord Keeper *North* told them, he wondered the counsel laid their shoulders to a point that had been so long since settled, and received as the constant course in Chancery. "It is true," said his Lordship, "there have been strong arguments used against the unreasonableness of this practice, and there might be likewise strong reasons brought for the maintaining of it, and so it was at first a case very disputable; but being once solemnly settled, as it was in the case of *Marsh* v. *Lee*, he would not now suffer that point to be stirred." See also *Holt* v. *Mill*, 2 Vern. 280. In *Wortley* v. *Birkhead* (2 Ves. 571), Lord *Hardwicke* fully approves of the principal case, and thus explains the foundation of the doctrine it establishes. "As to the equity of this court," observes his Lordship, "that a third incumbrancer having taken his security or mortgage without notice of the second incumbrance, and then being puisne taking in the first incumbrance, shall squeeze out and have satisfaction before the second, that equity is certainly established in general, and was so in *Marsh* v. *Lee*, by a very solemn determination by Lord *Hale*, who gave it the term of the 'creditor's tabula in naufragio;' that is the leading case. Perhaps it might be going a good way at first; but it has been followed ever since, and, I believe, was rightly settled, only on this foundation, by the particular constitution of the law of this country. It could not happen in any other country but this; because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates; and, therefore, as Courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and, therefore, where there is a legal title and equity of one side, this Court never thought fit that by reason of a prior equity against a man who had a legal title, that man should be hurt; and this by reason of that force this Court necessarily and rightly allows to the common law and to legal titles. But if this had happened in any other country, it could never have made a question; for, if the law and equity are administered by the same jurisdiction, the rule *qui prior est tempore potior est jure*, must hold." And see the remarks of Sir *W.*

Page Wood, V. C., in *Rooper* v. *Harrison*, 2 K. & J. 108, 109.

And it seems that where a person has lent his money upon the security of land, although the security taken is in the form of a conveyance upon trust to sell and pay the sum advanced, he may, by obtaining a transfer of the first mortgage gain priority over an intermediate incumbrancer; see *Spencer* v. *Pearson*, 24 Beav. 266; there the owner of land mortgaged first to Jackson, secondly to Mossop; and he then conveyed it to the plaintiff in trust to sell and pay Jackson and a debt due to a bank, another debt due to the plaintiff, and the residue to the owner. The plaintiff, who had no notice of Mossop's mortgage at the time of the conveyance to him, but discovering its existence by Mossop's instituting a suit for foreclosure, obtained a transfer of Jackson's mortgage. It was argued, that as the plaintiff had taken the conveyance to secure an existing debt, and not in consideration of money advanced on the security of the land, and as the conveyance was not in the form of a mortgage but of a conveyance in trust, he could not tack. Sir *John Romilly*, M. R., however, said, "he thought that this was an ordinary case of tacking. It was clear that the plaintiff had advanced his money on a security without notice of a prior one, and he afterwards got in the first and the legal estate. Mr. Mossop might have done the same if he had thought fit, but he had not done so."

In the well-known case of *Brace* v. *The Duchess of Marlborough*, 2 P. Wms. 491, the whole doctrine is very accurately stated by Sir *Joseph Jekyll*, M. R., in a series of rules which it is proposed to consider. The first general rule there laid down, within which, indeed, the principal case falls, is, "that, if a third mortgagee buys in the first mortgage, though it be pendente lite, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgagee; and this the Lord Chief Justice *Hale* called a 'plank' gained by the third mortgagee, or tabula in naufragio, which construction is in favour of a purchaser, every mortgagee being such pro tanto."

Where, however, a puisne mortgagee, having obtained the legal estate, parts with it on a sale of the mortgaged estate, he will only be entitled to claim a share of the purchase-money according to his priority in point of date. See *Rooper* v. *Harrison*, 2 K. & J. 86. "If," said Sir *W. P. Wood*, V. C., "the Court does not find the legal estate interposed, it deals with the money according to priorities," p. 109.

It will be observed that it is

laid down by Sir *Joseph Jekyll*, as in the principal case, that it matters not if the third mortgagee advanced his money without notice of the second mortgage, whether he afterwards obtains notice of it by a lis pendens or other wise. "This," says Lord *Hardwicke*, "has gone so far (and the original case was) that if a puisne incumbrancer took in the first incumbrance pendente lite, still he should have the same benefit: for in *Marsh* v. *Lee*, there was a lis pendens, yet was not the party affected with it; and so, I take it, in general it would be, notwithstanding a lis pendens; because the principle upon which all these cases depend is this, that a man's having notice of a second incumbrance at the time of taking in the first does not hurt; it is the very occasion that shows the necessity of it. It is only notice at the time of taking in the third, that will affect him; for then, no act he will do can help him. Then a lis pendens is nothing but notice; an actual notice is certainly as good as that by a lis pendens; one notice is, in consideration of this Court, as strong as another. Nay, actual notice is stronger than that implied by a lis pendens; it will not therefore affect him. That was *Marsh* v. *Lee*, and the other cases, which I agree to:" *Wortley* v. *Birkhead*, 2 Ves. 574. See also *Huntingdon* v. *Greenville*, 1 Vern. 49; *Hawkins* v. *Taylor*, 2 Vern. 29; *Belchier* v. *Butler*, and *Renforth* v. *Ironside*, 1 Eden, 523; *S. C.*, 5 Bro. P. C. 292, Toml. Ed., nom. *Belchier* v. *Renforth*; *Turner* v. *Richmond*, 2 Vern. 81; *Willoughby* v. *Willoughby*, 1 T. R. 773; *Robinson* v. *Davison*, 1 Bro. C. C. 63; *Spencer* v. *Pearson*, 24 Beav. 266; *Bates* v. *Johnson*, Johns. 304; *In re Russell Road Purchase Moneys*, 12 L. R. Eq. 78.

And, notwithstanding the doubt thrown out by Lord *Eldon*, in *Mackreth* v. *Symmons*, 15 Ves. 335, ante, 329, it is now clearly settled, that notice of his advance given by the second to the first mortgagee, will not prevent the third mortgagee, who lends his money without notice of it, from obtaining a transfer of and tacking his mortgage to the first: *Peacock* v. *Burt*, Coote on Mortgages, 569, 572; *S. C.*, 4 L. J., N. S., Ch. 33.

So where two or more successive mortgagees advance their money upon the security of real property, without notice of a prior trust fraudulently concealed by the mortgagor, the first mortgagee taking a mortgage of the legal estate, the last mortgagee is at liberty, after notice of the trust, and pending a suit by the cestuis que trust for redemption of the first mortgage, to pay off all the prior mortgages, and upon getting in the legal estate, to hold it until all the moneys advanced by him have been paid in full: *Bates* v. *Johnson*, Johns. 304.

The authorities have gone to this extent, that any person having an unsatisfied mortgage or charge upon real property is at liberty at any time before decree, to convey the legal estate in the property, in respect of his *unsatisfied* charge, to any subsequent incumbrancer who may have advanced his money without notice of any intervening or other charge or incumbrance, and by so doing may give to that other incumbrancer a right, which this Court cannot take from him, to insist upon the legal estate which, as the Court holds, he has thus properly acquired (per *Wood*, V.C., Johns. 315).

In the case, however, of a *satisfied* mortgage, where the mortgagee would hold simply upon trust for the original mortgagor, or those claiming under him, or in the case of a trustee of a satisfied term, a subsequent incumbrancer cannot, by obtaining a conveyance from such mortgagee or trustee *who at the time he made such conveyance had notice* of an intervening charge or trust, protect himself from such charge or trust by means of the legal estate which he has so obtained: *Carter* v. *Carter*, 3 K. & J. 617, 640; *Bates* v. *Johnson*, Johns. 304, 315, 316; *Prosser* v. *Rice*, 28 Beav. 74; but see *Pilcher* v. *Rawlins*, 7 L. R. Ch. App. 259, 274.

Upon the same principle, the priorities of several successive equitable mortgagees cannot be altered by the subsequent transfer, by the mortgagor, of the legal estate to any one of them, the mortgagor being a trustee of the legal estate for all such incumbrancers: see *Sharples* v. *Adams*, 32 Beav. 212, 216, where Lord Romilly, M. R. observed, "If the owner in fee simple, having the legal estate, creates an equitable charge in favour of A, and afterwards a second equitable charge in favour of B., and then a third equitable charge in favour of C., I apprehend that he cannot alter these equities by transferring the legal estate to any one of them, and the fact of the transfer of the legal estate to C., the owner of the third equitable charge, would not affect the rights of the first or the second."

Some doubt has been thrown on this dictum in *Maxfield* v. *Burton*, 17 L. R. Eq. 15, there *Ladkin* deposited title-deeds with his bankers to secure the balance of his account current, and executed a memorandum whereby, he agreed, at their request, to execute any deed, or deeds necessary for legally carrying out the security. Subsequently being about to be married, he agreed to settle the property. After the marriage, *Ladkin* conveyed the property to the trustee of the marriage articles upon the trusts therein contained, being for the benefit of the wife and the issue of the marriage. It was held by Sir *G. Jessel*, M. R., assuming that the parties claim-

ing under the settlement had no notice of the equitable mortgage, that *Ladkin* could not deprive the bankers of their priority by conveying the property to the trustee. "I do not think," said his Honour, "that I am at liberty to disregard the fact that there was in this case a contract to convey for value, as well as a deposit, and I should not be the first to hold that a man who had entered into such a contract could subsequently, at his option, squeeze out the person who was entitled to the benefit of that contract by conveying the legal estate to a person with whom he has entered into a subsequent contract for value, even although that person should be a purchaser without notice. . . . . I am not quite sure that without further authority I should go quite so far as my predecessor did in the case of the illustration he gave in *Sharples* v. *Adams* (32 Beav. 213)."

It may indeed be laid down as a general rule that an equitable incumbrancer, although he may have advanced his money originally without notice of a prior incumbrance, will not be allowed to gain priority by obtaining the legal estate from a person whom virtually or constructively he knows to be a trustee, for in that case he himself becomes a trustee. See *Allen* v. *Knight*, 5 Hare, 272; *Saunders* v. *Dehew*, 2 Vern. 271. See also *Mumford* v. *Stohwasser*, 18 L. R. Eq. 556, where money having been lent on an equitable mortgage without notice of a prior equitable agreement, it was held by Sir *G. Jessel*, M. R., that the equitable mortgagee gained no priority over the owner of the prior equitable interest by getting in the legal estate after he had notice that the mortgagor had made himself a trustee for the owner of the prior equity.

Where moreover a person knows that he is a trustee, he cannot by conveying the legal estate to an equitable incumbrancer, without receiving value at the time, and thereby committing a breach of trust, deprive his own cestui que trust of his rights. See *Mumford* v. *Stohwasser*, 18 L. R. Eq. 563.

A puisne incumbrancer will not be allowed to tack after a decree made to settle the priorities of incumbrancers: *Earl of Bristol* v. *Hungerford*, 2 Vern. 524, approved of by Lord *Hardwicke* in *Wortley* v. *Birkhead*, 2 Ves. 574. So, in *Ex parte Knott*, 11 Ves. 619, Lord *Eldon* observed, "There is no difficulty upon the point as to a decree to settle priorities. After that you cannot tack certainly, for there is a judgment for the creditors that they shall be paid according to their priorities. But you may, as was held in the House of Lords, up to the time of the decree, struggle for the tabula in naufragio; and, though the decree is in a sense only a judgment upon the rights as they stood at the time the bill was filed, yet it

was decided in that case, that until the decree you might do so." And see *Re Scott's Est.*, 14 Ir. Ch. R. 57.

An exception to the rule is mentioned by Lord *Hardwicke*, viz. that if a prior mortgagee takes an assignment of a third mortgage, as a trustee only for another person, he shall not be allowed to tack the two mortgages together, to the prejudice of intervening incumbrancers. If this was permitted, a mere stranger purchasing the third mortgage, by declaring he bought it in trust only for the first mortgagee, might tack both together, and defeat all the other incumbrancers: Per Lord *Hardwicke*, in *Morrett* v. *Paske*, 2 Atk. 52. See also *Shaw* v. *Neale*, 6 6 Ho. Lo. Ca. 581. So, also upon the same principle, it was held in *Barnett* v. *Weston*, 12 Ves. 130, that the executors of a first mortgagee of a leasehold, who had the legal estate in his own right, could not, as against a mesne incumbrancer, tack a mortgage of the equity of redemption which had vested in their testator as the executor of another. See and consider *Wilmot* v. *Pyke*, 5 Hare, 14; *Rooper* v. *Harrison*, 2 K. & J. 86.

But where a person has a debt secured under a deed, although it contains trusts for others, he may by taking a transfer of a good mortgage tack so as to gain priority over a mortgagee who had taken his security before the deed. *Spencer* v. *Pearson*, 24 Beav. 266.

So it seems that a person entitled to one security in his own right, and to another as executor or administrator, may nevertheless tack if he is entitled to the beneficial interest of the latter security. *Price* v. *Fastnedge*, Ambl. 685, *Blackwell* v. *Symes*, Ib., cited.

The second rule laid down in *Brace* v. *The Duchess of Marlborough*, 2 P. Wms, 491, in accordance with which that case was decided, is, "that, if a judgment creditor, or creditor by statute or recognisance, buys in the first mortgage, he shall not tack or unite this to his judgment, &c., and thereby gain a preference; for one cannot call a judgment creditor a purchaser, nor has such creditor any right to the land; he has neither jus in re nor ad rem; and, therefore, though he releases all his right to the land, he may extend it afterwards. All that he has by the judgment is a lien upon the land, but non constat whether he ever will make use thereof; for he may recover the debt out of the goods of the cognizor by fieri facias, or may take the body, and then, during the defendant's life, he can have no other execution; besides, the judgment creditor does not lend his money upon *the immediate view or contemplation of the cognizor's real estate*, for the land afterwards purchased may be extended on the judgment; nor is he deceived

or defrauded, though the cognizor of the judgment had before made twenty mortgages of all his real estate; whereas a mortgagee is defrauded, or deceived if the mortgagor before that time mortgaged his land to another." And see *Ex parte Knott*, 11 Ves. 617.

Upon the same principle, in *Lacey* v. *Ingle*, 2 Ph. 413, A., having mortgaged an estate to B. and C. in succession, agreed to sell it to D. free from incumbrances; part of the purchase-money was to be paid down, and the rest on the completion of the purchase. During the investigation of the title, A. induced D., who was ignorant of the mortgages, to make further payments on account of the purchase-money; and having also raised a further sum from E. on the security of his contract, without giving him notice of C.'s mortgage, became insolvent and absconded. D. thereupon, with notice of all that had happened, paid off C.'s mortgage out of the balance of the purchase-money remaining due; and E., to secure himself, took an assignment of B.'s mortgage. But the balance of purchase-money not being sufficient to pay both E.'s charge and what E. had paid to B., Lord *Cottenham*, C., reversing the judgment of the Vice-Chancellor *Knight Bruce*, held, that E. was not entitled to tack his security to B.'s mortgage, first, because he not only did not deal *upon the faith of the land*, or contract for any interest in it, but, as appeared upon the face of the contract, relied upon and advanced his money upon the faith of a fund which could only arise and have existence upon the supposition that the party to whom he advanced the money would not have, and at that time had not, any interest in the land; and, secondly, because, although E., at the time he advanced his money, had no notice of any particular encumbrance on the estate, except B.'s, he knew that he was dealing for a supposed balance, out of which D., having contracted for the estate free from encumbrances, would be entitled to pay off any incumbrances to which the estate might be found to be subject; and, therefore, the equities of D. and E. were not equal.

And it seems doubtful whether a judgment creditor, since the passing of the Judgment Act (1 & 2 Vict. c. 110), although a judgment duly registered is now a charge upon the land, can tack any more than he could previously. (See *Kinderley* v. *Jervis*, 22 Beav. 1; *Beavan* v. *Lord Oxford*, 6 De G. Mac. & G. 507; *Pickering* v. *The Ilfracombe Railway Company*, 3 L. R. C. B. 235; *Robinson* v. *Nesbitt*, Ib. 264, overruling *Watts* v. *Porter*, 3 Ell. & Bl. 743.) A recent learned author seems to think that he can do so (Fish. on Mortgages, 610, 3rd edit.); but he adds "that it may be considered that the doctrine of tacking is not

to be extended on the strength of an accident in legislation, Ib., p. 96."

Another rule in *Brace* v. *The Duchess of Marlborough*, 2 P. Wms, 494, is, "that if a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee, till both the mortgage and statute or judgment be paid." (See, also, *Shepherd* v. *Titley*, 2 Atk. 348; *Anon.*, 2 Ves. 662.) A fortiori, if the first mortgagee lends on a mortgage: *Morret* v. *Paske*, 2 Atk. 52; *Godfrey* v. *Tucker*, 33 Beav. 280; *Wyllie* v. *Pollen*, 11 W. R. (L. C.) 1081. But as will be shown hereafter, the further advance of the first mortgagee must have been made without notice of the intermediate incumbrance.

The recent case of *Young* v. *Young*, 3 L. R. Eq. 801, affords a strong illustration of the rule. There a testator, in 1832, devised his copyhold estate (which was subject to a legal mortgage by customary grant and admittance,) to his wife, for life, and then to his children. The will was never proved, and no notice of it was entered on the Court Rolls. The widow emigrated in 1845, leaving her eldest son in possession of the estate as her agent. In 1851 the son, falsely representing himself to be in possession as heir of his father, procured a further advance upon mortgage of the estate; and the original mortgage being transferred to the second mortgagee, he claimed a right to tack his further advance. The widow died in 1860. It was held by Sir *R. Malins*, V. C., that the mortgagee, having the legal estate, and having no notice of any adverse title, was entitled to be protected against the rights of the children, and to tack his further advance. See *Joncs* v. *Powles*, 3 My. & K. 581; *Carter* v. *Carter*, 3 K. & J. 617, 638.

Where the mortgage is paid off before the judgment is recovered, the judgment cannot be tacked to the mortgage, although there may not have been any reconveyance of the mortgaged estate: *The Mayor of Brecon* v. *Seymour*, 26 Beav. 548.

However, in all these cases, as is laid down in the sixth rule in *Brace* v. *The Duchess of Marlborough*, 2 P. Wms. 495, no subsequent incumbrancer will be allowed to tack his incumbrance, unless when he lent his money he had *no notice of* the second mortgage, statute, or judgment; for being without notice is his sole equity.

The rule is the same with regard to a first mortgagee, who will not be allowed to tack a subsequent mortgage, if he made the advance having notice of an intermediate incumbrance.

And it has even been held, contrary to the old case of *Gordon* v. *Graham* (7 Vin. Ab. 82, pl. 7; 2 Eq. Cas. Ab. 598), that although the first mortgage was made to secure a sum and *further advances*,

if the first mortgagee made a further advance with notice of a mesne incumbrance, he will not be entitled to priority in respect of such further advance. See *Shaw* v. *Neale*, 20 Beav. 157; there an estate was mortgaged to A. to secure a sum of money and *further advances*. Afterwards Shaw, the plaintiff, obtained a charge on the estate by means of a judge's order. It was held by Sir *John Romilly*, M. R., that the further advances made to the mortgagor by A., after notice of the order, had no priority over Shaw's charge. "The law," said his Honor, "with respect to the question whether a second incumbraucer, who takes, subject to a prior mortgage expressed to secure a sum then due, and also future advances, is entitled to priority over the advances made subsequently to his security by the first incumbrancer, with notice of such second incumbrance, is a point not free from doubt on the authorities. The ground on which it is put, in favour of the first mortgagee who claims priority for his subsequent advances, is, that the second mortgagee might, by a tender of the amount due to the first mortgagee, have stopped all further advances; and the case of *Gordon* v. *Graham*, (7 Vin. Ab. 52, pl. 3; 2 Eq. Ca. Ab. 598) is cited, where Lord *Cowper* held, that the second incumbrancer having, when he advanced his money, notice of the nature of the first mortgage, could not redeem the first mortgage without payment of the sum advanced by the first mortgagee after he had received notice of the second incumbrance. This decision has not met with the unanimous approbation of the profession. Mr. *Powell*, in his Treatise on Mortgages (2 Pow. Mortg. 6th Ed. 534, n.; but see 4 Byth. 2nd Ed. 427), doubts the soundness of the decision; and Lord *St. Leonards*, in *Blunden* v. *Desart* (2 Dru. & W. 405), says, 'that even in the case of a first mortgage, whether legal or equitable, covering future advances, it deserves further consideration, whether it would be safe to rely in all cases upon *Gordon* v. *Graham*, as an authority that advances may be safely made after the first mortgagee has notice of a second mortgage.' This case of *Gordon* v. *Graham* has never, I believe, been treated as an authority for holding that the doctrine applied to the case of a second incumbrancer, who advanced his money *without notice* of the first mortgage. Lord *Cowper* certainly relies on the fact of notice; for he observes, that it was the folly of the second mortgagee, with notice (of the first incumbrance) to take such security. This reasoning obviously fails to apply to the case of a second incumbrancer, who not only had no notice of the prior incumbrancer, but who obtains his charge on the estate not by reason of any contract with the owner, but by operation of law, which gives to the registered order to

pay the effect of an incumbrance on the land, for a debt which the debtor had refused or was unable to pay." His Honor's judgment was affirmed by the House of Lords. *Shaw* v. *Neale*, 6 Ho. Lo. Cas. 581; and was followed by *Hopkinson* v. *Rolt*, 25 Beav. 461; 3 De G. & Jo. 177; *S. C.*, nom. *Hopkinson* v. *Rolt*, 9 Ho. Lo. Ca. 514. So likewise in *Daun* v. *City of London Brewery Company*, 8 L. R. Eq. 155: on the 26th of March, 1858, a publican deposited the lease of his public-house with the defendants—a Brewery Company—with a memorandum, stating that the deposit was to secure payment of a sum of 202*l.*, and interest, as well as any other sums in which the depositor might become indebted to the Brewery Company on any account, not exceeding 500*l.* The Brewery Company on the 7th of July, 1865, made the publican a further advance of 100*l.* On the 11th of July, 1865, the publican signed to the plaintiffs—a firm of distillers—a memorandum whereby he declared that the documents deposited with the Brewery Company, should "subject to the security" to the Brewery Company be a security to the distillers for a sum of 120*l.* then due, and interest and all other sums that might thereafter become due to the distillers. Notice of this second equitable mortgage was on the same day given by the distillers to the brewers. After the date of this notice the publican became indebted to the brewers in a further sum of money—the price of beer supplied to the publican. The company claimed to be entitled, by virtue of a custom in the trade between brewers and publicans, to add this further sum to the amount secured by the deposit of the lease in priority to the distillers' charge. It was held, however, by *James*, V. C., that the alleged custom was bad in law for want of mutuality, and for want of defined limits; and further, that it was imperfectly supported by the evidence, and that consequently, according to the rule laid down in *Hopkinson* v. *Rolt*, the defendants, the Brewery Company, from and after the date of the second charge, were not entitled to any priority in respect of any goods supplied by them after the notice; and with respect to such goods, both parties having notice of the securities, their priorities were to be according to the dates of their respective supplies.

And the result will be the same, although the securities are executed on the same day and with the knowledge of all parties: *Menzies* v. *Lightfoot*, 11 L. R. Eq. 459.

The principle upon which these cases proceed is this, that the second charge was so framed as if it had said, "subject to the security as it stands at the moment," that is, to the amount of money now

due on the security: Per Lord *Romilly*, M. R., in *Menzies* v. *Lightfoot*, 11 L. R. Eq. 468.

If the parties wish to escape from this, they must say "subject and without prejudice to the principal moneys now due from me, and to such sums as I may hereafter owe, not exceeding the sum of £——." *Ib.*

Where, however, in a case similar to *Hopkinson* v. *Rolt*, the further advance is made by the first mortgagee without notice of an intervening advance by the second mortgagee, the first mortgagee will have priority over the second mortgagee, not only in respect of his first, but also in respect of his second advance (*Calisher* v. *Forbes*, 7 L. R. Ch. App. 109); nor will the first mortgagee lose his priority over the second mortgagee, if subsequently thereto he renews the original bill of exchange given for the sum advanced on the first mortgage. *Ib.* And see *Saunders* v. *Dehew*, 2 Vern. 271; *Allen* v. *Knight*, 5 Hare, 272; *Cannock* v. *Jauncey*, 1 Drew. 497, 507; 5 W. R. (V. C. K.) 764.

A first mortgagee cannot tack a subsequent debt taken in pendente lite (the lis pendens being duly registered), because the suit would affect him with notice of the mesne incumbrance: *Morret* v. *Paske*, 2 Atk. 53.

The last rule laid down in *Brace* v. *The Duchess of Marlborough*, 2 P. Wms. 495, is "that when a puisne incumbrancer buys in a prior mortgage, in order to unite the same to the puisne incumbrancer, but it is proved that there was a mortgage prior to that, the Court clearly holds, that the puisne incumbrancer, where he had not got the legal estate, or where the legal estate was vested in a trustee, could there make no advantage of his mortgage; but in all cases where the legal estate is standing out, the several incumbrances must be paid according to their priority in point of time: *qui prior est tempore potior est jure*." See *Symmes* v. *Symonds*, 4 Bro. P. C. 328; Toml. Ed.; *Earl of Bristol* v. *Hungerford*, 2 Vern. 524; 1 Eq. Ca. Ab. 142; *Phillips* v. *Phillips*, 4 De G. F. & J. 268; *Thorpe* v. *Holdsworth*, 7 L. R. Eq. 139.

But if any one of the incumbrancers has a better title than the others to call for a conveyance of the legal estate, as for instance when a declaration of trust of the legal interest has been made in his favour, or he has possession of the title-deeds, equity will consider him as being in the same position as if he had the legal estate: *Windham* v. *Richardson*, 2 Ch. Ca. 213; *Wilkes* v. *Bodington*, 2 Vern. 599; *Earl of Pomfret* v. *Lord Windsor*, 2 Ves. 436; *Ex parte Knott*, 11 Ves. 618; *Maundrell* v. *Maundrell*, 10 Ves. 271; *Wilmot* v. *Pike*, 5 Hare, 22; *Pease* v. *Jackson*, 3 L. R. Ch. App. 576.

The result is the same where an incumbrancer obtains the legal estate after advancing his money, in pursuance of a contract for a legal mortgage entered into at the time of the advance. See *Cooke* v. *Wilton*, 29 Beav. 100. There Anne Halling, in 1856 and 1857 deposited the title deeds of some freehold property with Ann Broughton to secure two sums advanced to her, and agreed in writing to execute a mortgage of it to secure the money. In 1858 the plaintiffs lent Anne Halling 91*l.* 10*s.*, and on the 1st of July they obtained a transfer of the two prior equitable mortgages, then amounting to 368*l.* 4*s.* Anne Halling at the same time signed a memorandum by which she declared that the 368*l.* 4*s.* and the money due to or to be advanced by the plaintiffs should be a charge on the property. The plaintiffs advanced further sums, and on the 29th of September, 1858, Anne Halling conveyed the legal estate in the property to the plaintiffs, subject to redemption on payment of 520*l.*, the aggregate of the moneys due. Previous to the transfer of the mortgages to the plaintiffs, viz., on the 29th of June, 1858, the defendant obtained a judgment against Anne Halling for 638*l.* 12*s.* 10*d.*, duly registered under 1 & 2 Vict. c. 110; but the plaintiffs did not know of the judgment until March, 1859. Sir *John Romilly*, M. R., held that the plaintiffs had priority over the judgment. "I think," said his Honor, "that the equitable mortgage and memorandum of deposit gave to Ann Broughton, and to all persons claiming through or under her, a right to have a legal mortgage of the property affected by the equitable mortgage, and of which the title deeds had been deposited, and that, consequently, the legal estate, when conveyed, must be considered to have reference back to the date of that security when given, and that all sums properly advanced are included in it; and if this be so, then the mortgagee is entitled to make use of the legal estate so obtained, to protect him not only for the amount due at the date of the deposit, but for any further or subsequent advance made by him on the security of the same property, bonâ fide, and without notice of any prior charge, on the principle of the doctrine which is usually called tacking."

An equitable mortgagee, earlier by registration, even on the same day, under the Middlesex Registry Act (7 Ann. c. 20), obtains priority over an equitable mortgagee prior in date, of which he had no notice, and he may consolidate his mortgages as against him: *Neve* v. *Pennell*, 2 H. & M. 170; 11 W. R. (V. C. W.) 986.

As a general rule, both in suits for foreclosure as well as in redemption suits, the *mortgagor* cannot redeem one mortgage without redeeming all other mortgages

which the mortgagee holds upon his property, and which he has a right to consolidate or tack together: (*Watts* v. *Symes*, 1 De G. Mac. & G. 240; *Selby* v. *Pomfret*, 1 J. & H. 336; 3 De G. F. & J. 595; 9 W. R. (L. C.) 583; *Neve* v. *Pennell*, 2 H. & M. 170; and see *Phillips* v. *Gutteridge*, 4 De G. & Jo. 531). Nor can the purchaser (*Beevor* v. *Luck*, 4 L. R. Eq. 537) or mortgagee of the equity of redemption do so: (*Ib.* 546; *Titley* v. *Davies*, 2 Y. & C. C. C. 399, n.): And it is immaterial whether the consolidation has taken place before or after the purchase or mortgage of the equity of redemption (*Ib.*; and see *Vint* v. *Padget*, 1 Giff. 446; 2 De G. & Jo. 611; *Tweedale* v. *Tweedale*, 23 Beav. 341), or whether such purchaser or mortgagee may or may not have had notice of the existence of other mortgages (*Ib.*; *Titley* v. *Davies*, 2 Y. &. C. C. C. 399, n). And the rule is applicable to equitable mortgages (*Neve* v. *Pennell*, 2 H. & M. 170); to mortgages of equitable personalty by way of trusts for sale, as well as to ordinary mortgages of real estate (*Watts* v. *Symes*, 1 De G. Mac. & G. 240); and it makes no difference whether the mortgages are held by the same person, or in trust for the same person: *Tassell* v. *Smith*, 2 De G. & Jo. 713, 718.

In the old case of *Bovey* v. *Skipwith*, 1 Ch. Ca. 201, where the third mortgagee of one estate who advanced his money without notice of an intermediate mortgage of that and another estate, bought in and took a transfer of a first mortgage, comprising both estates, it was decided that he might hold the two estates as against the second mortgagee until all that was due to him on both securities should be satisfied.

The question, however, of notice, at the time of the consolidation, as before mentioned, is immaterial. Thus, where two mortgages of distinct estates, originally vested in different mortgagees, were transferred to one person, even with notice of a second mortgage of both estates, it was held that the second mortgagee could not redeem the one estate without the other: *Vint* v. *Padget*, 1 Giff. 446, 2 De G. & Jo. 611; and see *Tweedale* v. *Tweedale*, 23 Beav. 341. There A. made two equitable mortgages of two several estates, the one to A. and the other to B. He then executed a legal mortgage of both to C., who had constructive notice of the prior equitable mortgages. B. obtained a transfer of A.'s mortgages. It was held by Sir *John Romilly*, M. R., that C. could only redeem B. on payment of both debts.

Where mortgages of different properties by the same mortgagor have been consolidated by a mortgagee, and the mortgagor has conveyed the equity of redemption in some of the properties to pur-

chasers by deeds of various dates, upon foreclosure by the mortgagee, a first right of redeeming all the mortgages will be given to the first purchaser of part in point of date, with successive rights of redemption, in default, to the subsequent purchasers of other parts in order of date, as in the case of first, second, and third mortgagees: (*Titley* v. *Davies*, 2 Y. & C. C. C. 399, n., and *Beevor* v. *Luck*, 4 L. R. Eq. 537; overruling *Edwards* v. *Martin*, 28 L. J. Ch. 49; 4 Jur. N. S. 1044; 7 W. R. 31). But where the owners of the equity of redemption, though of different priorities as to their period of enjoyment, come in under the same instrument, as for instance tenant for life, and remainderman under a settlement, there no successive rights to redeem are given, but only one single common right of redemption: *Beevor* v. *Luck*, 4 L. R. Eq. 537, 548.

The principle upon which these cases proceed, as appears from the authorities, is stated by Lord *Hatherley*, C., in *Beevor* v. *Luck*, 4 L. R. Eq. 544, as follows: "That where a man has not redeemed his mortgaged property within the limited time and has forfeited his estate, when he comes into equity to assert a right to have the estate back, the Court has said, 'You shall not have equity without doing equity;' and if, therefore, having mortgaged a valuable estate as an ample security for an advance made by one mortgagee, you have afterwards mortgaged to the same mortgagee an estate of less value, and the smaller estate will not pay the whole debt, you shall not redeem the estate which is valuable to you without also paying the debt which is secured on the deficient security.' Afterwards that equity was extended (whether rightly or wrongly it is now too late to question) to the case of a person who takes a transfer of the deficient mortgage on the smaller estate. If he gets in the interest of a prior mortgagee from the same mortgagor, he is entitled to stand as against all purchasers subsequent to the second mortgage coming to redeem, and to say, 'You cannot redeem one unless you redeem both': *Titley* v. *Davies*, 2 Y. & C. C. C. 399, n., was a case of that description . . . . . And where there is a third mortgage of the equity of redemption, which takes place anterior to the union of two prior mortgages in the person who attempts to foreclose a third mortgage, there the equity must prevail, &c. . . . Lord *Hardwicke*, in the case of *Titley* v. *Davies* (2 Y. & C. C. C. 399, n.), says this: 'I see no difference between Peyton and Davies' (Peyton being the purchaser), 'for though one is a purchaser, and the other a mortgagee, that will not differ the case as to Titley; for they are both considered as purchasers in this Court

pro tanto.' So that it would be impossible for me to draw a distinction between the case of a purchaser and that of a person coming in as a mortgagee. The real point seems to be this, as far as it is possible to apply reasoning to a rule which is somewhat difficult to reconcile altogether with sound principles: whenever the right to redemption is passed over to another person by the original mortgagor, whether he sells the whole property or passes it by way of mortgage on—in either one case or the other, he passes it over subject to the same equities as against the purchaser or mortgagee to which he himself was subject. That being so, the purchaser is obliged to take it, as was said in *Vint* v. *Padget*, (2 Y. & C. C. C. 399, n.), knowing that it is liable to the contingency of the coalescing of the two mortgaged estates, even although at the time of the conveyance they may not have coalesced. In *Vint* v. *Padget*, the person who united the two securities, and then asserted the right, knew before he united them that there was this intervening security. The Court said that the question of notice had nothing to do with it; the plaintiff has a right to unite the two estates; and, having that right, the person who is unfortunately affected by it must be taken to have known that there was the possibility of such union taking place. Knowing that, he should not have advanced his money on the second mortgage."

It seems, however, where there are two first mortgages of distinct properties made at different times by the same mortgagor to different persons, that if the second of such first mortgages were not in existence at the time when the subsequent mortgages were made of the property comprised in the first of the two mortgages, the second of such first mortgagees cannot by taking a transfer of the first mortgage compel such subsequent mortgagees to pay him what is due on his two mortgages, before redeeming the property comprised in the two first mortgages, although he might compel the mortgagor to do so: *Baker* v. *Gray*, 1 Ch. D. 494.

A mortgagee may, on the bankruptcy of the mortgagor, if his assignees do not immediately redeem, take a transfer of a mortgage on another of his estates, and tack it to the debt due under the mortgage to himself, and he is entitled to hold the two estates as a security for both debts (*Selby* v. *Pomfret*, 1 J. & H. 336; 3 De G. F. & Jo. 595); and the right of such mortgagee is not prejudiced by reason of his having exercised the power of sale contained in the mortgage so transferred to him, and he is entitled to retain the surplus of the purchase-money beyond the amount secured on that mortgage to satisfy the sum due to him on his own mortgage. *Ib.*

Where a first mortgagee or any of the mortgagees purchases and takes a conveyance to himself of the equity of redemption, he cannot set up his mortgage against any of the subsequent incumbrances of which he had notice: (*Toulmin* v. *Steere*, 3 Mer. 210; *Brown* v. *Stead*, 5 Sim. 535; sed vide *Hayden* v. *Kirkpatrick*, 13 W. R. (M. R.) 1010; 11 Jur. N. S. 836; *Anderson* v. *Pignet*, 8 L. R. Ch. App. 180; *O'Loughlin* v. *Fitzgerald*, 7 I. R. Eq. 483;) but a prior mortgage, if kept on foot against the estate, may be used by the purchaser of the equity of redemption, as a protection against the intervening incumbrances. See *Parry* v. *Wright*, 1 Sim. & St. 369; *S. C.*, 5 Russ. 142; and see *Otter* v. *Lord Vaux*, 2 K. & J. 650; 6 De G. Mac. & G. 638; *Chesshyre* v. *Biss*, 2 Giff. 287; and Leading Cases on Real Property, 2nd ed., 855.

The principle upon which *Toulmin* v. *Steere*, and similar cases proceed has been much disapproved of, and will not at the present day be extended. See *Stevens* v. *Mid-Hants Railway Company*, 8 L. R. Ch. App. 1064, 1069, 1070; 2 Dart, V. & P. 917; and *Adams* v. *Angell*, W. N. 1876, p. 284; *Ib.* 1877, p. 52, which was, however, distinguishable from *Toulmin* v. *Steere*.

An important alteration was made in the law of tacking by the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), which came into operation on the 7th of August, 1874, and whereby it is enacted that "after the commencement of this Act no priority or protection shall be given or allowed to any estate, right, or interest, in *land* by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every Court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice, provided always that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act." (Sect. 7.)

This enactment, however, was very short lived, for by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), which commenced on the 1st of January, 1876, it is enacted that the 7th Section of the Vendor and Purchaser Act, 1874, is hereby repealed, except as to anything duly done thereunder before the commencement of this Act." (Sect. 129.)

Mortgagee's right to tack debts not being liens on the mortgaged property.]—With regard to the right of a mortgagee to tack to

his security, debts not being liens upon the estate, it seems that in the case of a mortgagee of real estate as against the heir (*Margrave* v. *Le Hooke*, 2 Vern. 207; *Jackson* v. *Langford* (Anon.), 2 Ves. 662; *Morret* v. *Paske*, 2 Atk. 53; *Jones* v. *Smith*, 2 Ves. Jun. 376; *Elvy* v. *Norwood*, 5 De G. & S. 240) and devisee (*Heames* v. *Bance*, 3 Atk. 630; *Coleman* v. *Winch*, 1 P. Wms. 775; *Du Vigier* v. *Lee*, 2 Hare, 340) of the mortgagor, he might always tack specialty debts, and under the Simple Contract Debts Act (3 & 4 Will. 4, c. 104) he may as against the heir or devisee of the mortgagor, tack simple contract debts: *Rolfe* v. *Chester*, 20 Beav. 610. Specialty debts, however, taking priority over simple contract debts prior to the passing of 32 & 33 Vict. c. 46, which made them payable pari passu.

In the case of a mortgage of personalty the mortgagee as against the executor of the mortgagor, could always tack, not only bond and other specialty (*Anon.*, 2 Vern. 176), but also simple contract debts: *Coleman* v. *Winch*, 1 P. Wms. 775; *Eccles* v. *Thawill*, Prec. Ch. 18; and see *Spalding* v. *Thompson*, 26 Beav. 637; *In re Hazelfoot's Estate*, 13 L. R. Eq. 327, where policies of assurance were mortgaged. See, also, *In re General Provident Assurance Company, Ex parte National Bank*, 14 L. R. Eq. 507, 516.

But a mortgagee cannot tack debts not being liens upon the mortgaged estate, whether they be bond or other specialty debts or simple contract debts, as against the mortgagor (*Challis* v. *Casborn*, Prec. Ch. 407; *Archer* v. *Snatt*, 2 Stra. 1107; *Elvy* v. *Norwood*, 5 De G. & Sm. 240), his creditors (*Coleman* v. *Winch*, 1 P. Wms. 775; *Heames* v. *Bance*, 3 Atk. 630; *Hamerton* v. *Rogers*, 1 Ves. Jun. 513; *Adams* v. *Claxton*, 6 Ves. 225; *Rolfe* v. *Chester*, 20 Beav. 610), his assignees for value (*Troughton* v. *Troughton*, 1 Ves. 86; *Jackson* v. *Langford* (Anon.), 2 Ves. 662; *Adams* v. *Claxton*, 6 Ves. 225), devisees in trust for payment of debts (*Heames* v. *Bance*, 3 Atk. 630; *Irby* v. *Irby*, 22 Beav. 217), parties entitled to the benefit of a charge for payment of his debts (*Price* v. *Fastnedge*, Amb. 685), or the assignee of his heir (*Coleman* v. *Winch*, 1 P. Wms. 775; *Bayly* v. *Robson*, Prec. Ch. 89), executor (*Coleman* v. *Winch*, 1 P. Wms. 775; *Vanderzee* v. *Willis*, 3 Bro. C. C. 21, 23), or devisee (*Ib.*) or any mesne incumbrancers, whether by mortgage, judgment, or statute: *Morret* v. *Paske*, 2 Atk. 52; *Powis* v. *Corbet*, 3 Atk. 556; *Lowthian* v. *Hasel*, 3 Bro. C. C. 162; *Anon.*, 2 Ves. 662.

The reason why such tacking of debts by mortgagees has been allowed, is to prevent a circuity of action against persons in whose hands the equity of redemption of the mortgaged properties were

assets for the payment of debts: see *Heames* v. *Bance*, 3 Atk. 630; *Lowthian* v. *Hasel*, 3 Bro. C. C. 162; *Anon.*, 2 Ves. 662.

Under the doctrine of tacking, a mortgagee, or those who claim under him, where the mortgage debt is secured, either by the ordinary covenant in the mortgage deed or a bond, may in a suit for redemption or for foreclosure claim by statute 3 & 4 Will. 4, c. 42, s. 3, arrears of interest for twenty years before the institution of the suit under the covenant or bond, although by the Act for the Limitation of Actions and Suits (3 & 4 Will. 4, c. 27), s. 42, under the deed, without either the covenant or bond, his right to recover interest is limited to six years' arrears: *Du Vigier* v. *Lee*, 2 Hare, 326; *Hunter* v. *Nockolds*, 1 Mac. & G. 640, 650; *Elry* v. *Norwood*, 5 De G. & Sm. 240.

DUKE OF ANCASTER *v.* MAYER.

26*th June*, 1783. 16*th June*, 1784—85. *July*, 1785.

[REPORTED 1 BRO. C. C. 454.]

PRIMARY LIABILITY OF PERSONAL ESTATE TO THE PAYMENT OF DEBTS.—EXONERATION.]—*Personal estate, not specifically bequeathed, is primarily liable to the payment of the debts of a testator, unless it be exempted by express words or necessary implication.*

Notwithstanding a charge upon a term for payment of debts, a leasehold estate purchased by the testator subject to a mortgage shall bear the burthen of that mortgage, it not being properly the debt of the testator.

CHARLES BERTIE made his will, dated the 9th of November, 1759, and thereby devised as follows: "I give and devise to Thomas Noel and John Mayer, their executors, administrators, and assigns, all those my manors, lands, &c., in Lincolnshire, to have and to hold to them, from the time of my decease, *for the term of ninety-nine years*, upon the trusts hereinafter mentioned." He then gave the real estate, subject to the term, and in default of issue of his own body, to Montague Bertie, for life, remainder to his first and other sons in tail male, remainder to the plaintiff for life, remainder to his first and other sons in tail male, with remainders over, and afterwards declared as follows: "I do hereby declare, that the *term and estate so as aforesaid limited to them the said Thomas Noel and John Mayer, their executors, administrators, and assigns, for ninety-nine years*, is upon the special trust and confidence, and to the intents and purposes following; that is to say, Upon trust and confidence that they the said Thomas Noel and John Mayer,

their executors, &c., shall *out of the rents and profits*, or *by mortgage, assignment, or demise* of all or any part of my before-mentioned manors, &c., or any of them, for all or any part of the said term of ninety-nine years, or otherwise as to their discretion shall seem meet, levy and raise so much lawful money of Great Britain as will be sufficient *to pay and satisfy all the debts I shall owe at the time of my decease*, my funeral charges, and all the legacies and sums of money given by me in and by this my will, and pay and apply the same accordingly. And my will and mind is, that, after so much money shall be raised as shall answer the purposes aforesaid, together with all costs and charges in or about levying or raising thereof, the said term shall cease and determine." He then devised as follows: "*I give and devise* to my brother, Montague Bertie, his executors and administrators, all that the *manor of* East and West Deeping, *holden by lease from the Crown, subject* to the yearly rents and covenants reserved in the said lease, and also *subject to the mortgage thereon to Mrs. Millicent Neate, of London, for* 6500*l.*; but in case my said brother shall not be living at the time of my decease, then I give the said estate and premises, with the appurtenances, subject as aforesaid, to such person as shall be entitled to the freehold of my real estate at the time of my decease, by virtue of the aforesaid limitations in this my will." And towards the end of his will he devised as follows: "Item, I also give all my household goods, and all other my goods, chattels, effects, and personal estate whatsoever and wheresoever, unto my said brother, Montague Bertie, if he shall be living at the time of my death; but in case he shall be then dead, I give and devise the same to such person as shall be entitled to the freehold of my real estate, under and by virtue of the limitations in this my will: provided always, and I do hereby declare my mind and will to be, that in case I shall at the time of my death leave issue of my own body, that then and in such case as well all and every the before-mentioned uses, devises and limitations to my said brother, Montague Bertie, the Duke of

Ancaster, and their respective heirs, and also the devise of the residue of my personal estate, shall be utterly void; and in such case I do hereby will, and my mind is, that all my real estate, subject to the said term of ninety-nine years, shall descend according to the rules of law, and that the residue of my personal estate shall go and be distributed in such manner, and to and among such persons, as if I had died intestate. And I do hereby nominate and appoint the said Thomas Noel and John Mayer executors of this my last will; and I do hereby will, order, direct, and appoint, that my said executors and the survivor of them shall and do pay, satisfy, and discharge my funeral charges, *and all my debts and legacies*, as soon as they shall become due and payable, by such methods, ways, and means, and in such manner as he or they, or their counsel learned in the law, shall in that behalf advise and think meet; and it shall and may be lawful to my said executors, or either of them, to deduct and satisfy to him or themselves, out of my personal estate, or out of the moneys to be raised out of the said term of ninety-nine years before to them devised, all such disbursements, expenses, and charges which they or either of them shall be put to in proving this my will, or by any other ways or means whatsoever in or about the execution of this my will."

Montague Bertie died in the lifetime of the testator, and the plaintiff became entitled, under the limitations in the will, to the real estate.

The *leasehold estate had been, several years before, mortgaged by the testator's father for* 6500*l.* to Mrs. Neate, and in 1765 the mortgage was assigned, by the desire of the testator, to Sir Thomas Palmer, who advanced the testator a further sum of 100*l.* on it, and the testator conveyed other estates as an additional security for the 6660*l.*

This cause was first heard before the late Lords Commissioners.

Mr. *Mansfield*, Mr. *Madocks*, and Mr. *Kenyon*, for the

plaintiffs.—There are three questions in this case: first, whether the personal estate is exonerated of the debts; secondly, whether the mortgaged estate is liable to the mortgage; thirdly, what interest the duke takes in the personal estate.

As to the first, although the personal estate be the original fund for the repayment of debts, yet the testator may discharge it against the devisee of his real estate; and if his intent so to discharge it appear upon the face of the will, that intention shall govern. Here he has created a term for the payment of his debts, which sufficiently points out his intention. The cases show, that an intention so demonstrated is sufficient. *Bamfield* v. *Wyndham*, Prec. Ch. 101: the testator providing a real fund for the payment of his debts, and giving his personalty to his wife, it was held, she should take it exonerated from the debts. *Wainwright* v. *Bendlowes*, 2 Vern. 718: devise for payment of debts, and the personalty held exempt. In *Walker* v. *Jackson*, 2 Atk. 624, the personal estate was held to be a specific legacy, and of course exonerated. *Anderton* v. *Cooke*, 4th June, 1775: Thomas Calendar gave several specific parts of his personal estate; he then gave part of his real estate in strict settlement, and devised the remainder of his real estate to trustees, in trust to sell for the payment of debts; and in case that should not be sufficient to discharge the debts, he charged the deficiency on the devised real estates. He then gave the residue of his personal estate, not before bequeathed, to his wife. The Court held, she took it wholly exempt from the debts. In *Stapleton* v. *Colvile*, Ca. t. Talb. 202; in *Holliday* v. *Bowman*, before Lord *Bathurst*, 1 Bro. C. C. 145, cited; *Kynaston* v. *Kynaston* (*a*), and *Glede* v. *Glede*, the same doctrine has been held.

(*a*) The testator by his will charged his whole estates with payment of all his debts, legacies, and funeral expenses; and for that purpose he devised particular lands to trustees in trust to sell the same, and pay his debts, legacies, and funeral expenses; and he gave to his wife all his personal estate whatsoever, and constituted her sole executrix. The debts exceeded the personal estate. Lord *Bathurst* determined the personal estate to be exempt.

Secondly, the second point is, whether the mortgage shall also be discharged by the real estate. This point is determined by the case of *Serle* v. *St. Eloy*, 2 P. Wms. 386, which is recognised in *Galton* v. *Hancock*, 2 Atk. 437.

Thirdly, the last question is, what interest the duke

shall take. He claims under the description of the person who should come into possession, and must take the same interest that Montague Bertie would have taken; that is, the absolute interest.

Mr. *Selwyn*, Mr. *Arden*, and Mr. *Ainge*, for the defendants.—As to the last question, we contend the duke can take a limited interest for life only, there being no addition of executors or administrators in the will. Secondly, with respect to the second, that the mortgaged premises must bear their own burthen.

As to the other, which is the principal question, it depends on the several clauses in the will. The first clause creates the term; the next, which is material, is that by which he gives the personal estate; the third that appointing the executors, and directing them to pay the debts by such means as they should think meet. In this case there is no specific bequest of the personal estate. If he had meant the executors should pay the debts out of the term, he would not have left it in their option how they should pay them. In order to exonerate personal estates from the payment of debts, there must be an express direction that they shall be paid out of some other fund, or something tantamount to such express direction; but here is no necessary implication that the fund should be exempt. In *Bamfield* v. *Wyndham* the debts were more than the amount of the personal estate. In *Wainwright* v. *Bendelowes* the estate was ordered to be sold out and out. In *Bromhall* v. *Wilbraham* (at the Rolls, November, 1734), the testator gave all his personal estate to his sister, whom he made executrix; he gave his real estate to his brother, charged with his debts; but the personal estate was held to be first liable. In the case of *Lord Inchiquin* v. *O'Brien* (*a*) (8th February, 1744), before Lord *Hardwicke*, the Earl of Thomond by his will directed that all his debts should be paid. He devised his real estate to Lord Inchiquin and another, in trust that they should make sale of a sufficient part of the estate, and out of the money arising therefrom, together with the rents and profits, should, in the first place, pay all the

(*a*) *Lord Inchiquin* v. *French*, Amb. 33; 1 Cox, 1; 1 Wils. 82.

debts which he should owe at the time of his death, and his legacies; and subject thereto he limited his real estate over. He gave Sir William Wyndham 20,000*l.*, and some other legacies; then followed these words: "and his further will was, that the whole money to be raised by such sale should be taken as part of his personal estate;" lastly, he gave the rest and residue of his personal estate whatsoever, after payment of his debts, to the defendant; the personal estate was first applied. In *Fereges* v. *Robinson*, Bunb. 301, the same doctrine was laid down, because, as the Court observed, there were no negative words to exonerate the personal estate. In *Stephenson* v. *Heathcote* (*a*), Harper devised lands to trustees, in trust, by sale or mortgage, to raise so much money as would pay all his debts and funeral expenses; he then gave a silver tobacco-box to A. B., and gave all the residue of his personal estate to his wife, and made her executrix: Lord *Northington* ordered the personal estate to be first applied.

(*a*) 1 Eden, 38.

Lord Commissioner Ashurst delivered the opinion of himself and Lord Commissioner Hotham.—The first question is, whether, under the will of Charles Bertie, the plaintiff is entitled to the personal estate, discharged of the debts. Secondly, whether the personal estate is the fund out of which the mortgages are to be paid. Thirdly, what estate the plaintiff takes in the freehold and personal estate.

The main question is, whether the plaintiff is entitled to the personal estate, discharged of the debts. The cases are determined on different grounds. *Adams* v. *Meyrick*, 1 Eq. Ca. Ab. 271, which is in favour of the plaintiff, made the ground that the testator said that the trustees do and shall, by mortgage, &c., pay: this is a very loose ground, and has been since abandoned. *Fereges* v. *Robinson*, in Bunb. 301, is the most sensible case. In *Walker* v. *Jackson*, 2 Atk. 624, Lord *Hardwicke* says, the general rule is, that the personal estate shall be first applied, but that against his devisee the testator may

charge his real estate instead of his personal. The personal estate must be first applied, unless there are express words or a plain intent to the contrary. The only question in every case of this kind is, whether you can satisfactorily find out whether the testator meant to exempt the personal estate from the debts, for there are no technical words by which it is to be done. In this case, if it depended on the two clauses in the will, the intent could not be doubted—the trustees are to raise sufficient to pay all the debts. The next thing to be considered is, whether there is anything in the latter part of the will to overturn this apparent intent. It seems highly probable the word "residue" was thrown in without any meaning, or to give an option to the trustees out of which fund to take their expenses, and that they might not be in advance. At all events, it excludes the idea that the charge was to fall upon the personalty. The more modern authorities have gone in exclusion of the personalty, upon much less reason: *Anderton* v. *Cooke; Holliday* v. *Bowman*, 1 Bro. C. C. 145, cited. We think the Duke of Ancaster is entitled to the personal estate, exempt from payment of debts.

The next question is, whether it should be charged with the mortgages. And as to this point, we are bound by the cases of *Serle* v. *St. Eloy*, 2 P. Wms. 386, and *Galton* v. *Hancock*, 2 Atk. 424, to decree that the mortgage must be paid out of the devised estate.

The third question is, what interest the duke takes in the personalty. He took an absolute one: there is no need of express words for this purpose; it is beyond a doubt Montague Bertie would have taken absolutely; then, where the testator gives it by the description of the person entitled to the freehold, he does not state the interest so given to be a less interest than that of Montague Bertie.

A petition was presented for a rehearing, which came on before Lord *Thurlow*, the 16th of June, 1784. The arguments used, and the cases cited, were a recapitulation of those before the Lords Commissioners.

Lord Chancellor Thurlow.—It would be highly advantageous to property if there was a settled rule where the personalty shall be applied to the payment of debts, and where it shall be exempted from them. One step has been taken towards such a rule, by its being laid down, that charging the estate in any way is not of itself an exemption of the personal estate; that the personal estate being the fund first liable, where it is to be aided by either a legal or an equitable fund, it must be itself in the first place applied.

The question that next arises is, whether, a real estate being charged, and the personal given away, a presumption arises that this shall be exempted from the debts. I never heard, till the arguments in this case, that such a rule had been extracted from the authorities on the subject; on the contrary, I have always understood that, in order to exempt the personal estate, the testator must express an intention so to do, although no particular form of words was necessary for the purpose. I therefore take the rule in primis to be, that neither the charge of the debts upon the real estate, nor the gift of the personal estate, is sufficient of itself to exempt it. But it is indubitably true, that express words are not necessary to exempt the personal estate: the question therefore is, whether a presumption can be drawn of the testator's intention to exonerate the personal estate. It is impossible to express in definition what circumstances shall be sufficient to raise this presumption. It must arise from the context of the will; but, with great deference to the opinion which has been given, I think there is not sufficient in this will.

After devising his real estate, the testator takes up the term; he places it before any of his other estates, and before his issue, so that he meant it to be a subsisting term for the payment of his debts. He gives his leasehold estate to Montague Bertie, but without any predilection; for he gives it to whoever should be entitled to the possession of his freehold estate. He then proceeds to declare the trusts of the term which are to raise money

to pay his debts and legacies ; and after raising them, the term is to cease. He then disposes of the rest of his personal estate. He afterwards determines what shall be done with the personal estate in case he should have issue. In the provision which he superadds, he takes notice of the devise of the personalty, and calls it a residue ; by which he means the devise of the personal estate after the specific bequest. He provides then, that if he should die leaving issue, the dispositions he had made should fail : this was not essentially necessary, though apparently so. He then makes a general provision for the discharge of the executors, who are also trustees ; so that it is given them in the character of executors. It is also material to observe, that, in the special and general disposition of the personal estate to the same person who shall be entitled to the possession of the real, the personal is made to accrue to the real, which is settled with the utmost strictness. The question, then, is whether any inference is to be drawn that he meant it should go with the burthen the law throws upon it, or whether it is to be presumed that it should be exonerated, for the purpose of throwing that burthen on the freehold estate, which he has given in the strictest manner. The inference rather seems to me to be, that he meant to protect the real estate, and therefore that the personal should bear its natural burthen. By chance he has gone further : for, where he has given directions for the indemnity of his executors, he has directed the expenses to be taken out of either the personal or real estate. He has, in that clause, arranged the estates as the law would arrange them ; which affords an inference that he meant the real estate only to be in aid of the personal. I should therefore think, if the rule were, that the gift of the personal estate to a stranger was sufficient to raise a presumption that it was to be exempt from the debts, he had sufficiently here expressed his intention that it should not be so ; but I take the general rule to be the other way.

I should have no doubt on the intention of the testator

in this respect, if there were not another point, which I think ought to undergo further inquiry—I mean the mortgage of the leasehold estate. The case of *Serle* v. *St. Eloy* (*a*) went upon the idea of the charge upon the real estate being the debt of the testator. If that case were recent, and had not been followed, I should have thought, upon the face of it, it was very open to argument. The difference between the cases is, that if it had been real estate mortgaged by the father, it would have been liable only as a charge; but, in the present case, the debt of the father falls upon the estate in two ways—partly as being a charge, and partly as a debt, upon the personal estate. It must be referred to the Master to consider the circumstances of the debt of 6000*l.*, and the estate on which it was secured; and, as that point must stand over, I shall think it no impediment to the justice of the Court to defer the decree upon the other point also.

(*a*) 2 P. Wms. 386.

The Master having made his report that the 6000*l.* was a charge upon the leasehold estate prior to the testator's having any interest in it, and that he had only covenanted for the payment of the money upon the transfer of the mortgage from Mrs. Neate to Sir Thomas Palmer (*b*), the cause was again set down for argument on the 4th July, 1785, and then stood for judgment till the next day, when the Lord Chancellor pronounced his decree.

(*b*) A further sum of 100*l.* was, it seems, advanced to the testator. Vide ante, p. 683.

Lord Chancellor Thurlow.—Whether the personal estate should be liable, in the first instance, in exoneration of the real estate, to the payment of debts in wills of this kind, upon looking into the cases I find to be a point so slender and fine that I cannot collect any certainty upon the question; but so much uncertainty abounds, that, could the will of the testator be referred to a number of lawyers, they would probably entertain a diversity of opinions upon it.

The point ought to be fixed; and, in order to make it so, I take it, the rules have been these, and should be adhered to. In the first place, that *the personal estate is*

liable in the first instance to the payment of the debts; but (in exception to this) it is agreed that the testator may, if he pleases, give his personal estate, as against his heir or any other representative, clear of the payment of his debts; and then it becomes a question, what is the mode of expression to give the personal estate exempt from such payment, when the rule of law is, that such estate is first liable. Perhaps it might have been not unwise to have adopted the rule laid down in *Fereges* v. *Robinson* (*a*)—that the testator must use express words for that purpose; but it is impossible to abide by the opinion given in that case, consistently with the rules in other cases. The second rule is, that *where there is a declaration plain, that shall stand in lieu of express words.* This rule has been laid down so long, and acted upon so constantly, that if other judges were to put the construction of wills upon other grounds, how wise soever it might have been originally to have done so, it would be very unwise to make the administration of justice take a course contrary to former rules. Therefore, if there be a declaration plain, or manifestation clear, so that it is apparent, upon the face of the will, that there is such a plain intention, the rule then is, not to disappoint, but to carry such intent into execution. But should not such intention manifestly appear, there is not a single case which does not take it for granted that the personal estate is, by law, the first fund for the payment of debts.

(*a*) Bunb. 301.

In regard, then, to the general intention of the will of Charles Bertie, the testator was seised of a real estate, which he had in his contemplation (exclusive of the idea of his own children), and wished to leave it to other lines of the family of Bertie; and consequently devised it to Montague Bertie, with remainder over to Peregrine Bertie for life, &c.: so far, in respect of the real estate, his intention was to fix it in the name and blood of the family.

The next object he had in view was a leasehold estate, which he held under the crown; that estate was a chattel interest, and with regard to that, he does not show such

a wish to fix and continue that estate in the line of Bertie: his apparent wish was not so strong as in respect to the disposal of his real estate; for had it been so, though he could not have created an entail of this leasehold estate with limitations over, yet he might have prevented the first taker of it from alienating it. Had the testator been asked the question, whether he meant that this part of his estate should be subject to the mortgage, or to give it entire to the first taker of the real estate, or to charge the term of ninety-nine years in exoneration of the other estate, this might have been a very doubtful question, and merely conjectural, though, perhaps, he might have answered, that that estate should pay the debts; but whatever his intention was, he has positively given it subject to the payment of the debt: therefore, if another estate had been appropriated to payment of his debts, and this had been *his* debt upon the estate, I should have concurred with the Lords Commissioners (*a*): but in following them in that course, in which they considered it as being the clear intention in the mind of the testator, that the real estate should be so appropriated, I rather think otherwise; for it appears to me as if the testator wished it should not, and that he chose that the leasehold estate should be so appropriated rather than to have burthened the real estate. For the mode of limiting the estate to Montague Bertie for life implies the intention of giving him a personal bounty; but, in case of failure of issue, he gives it to the next heir who should come into possession, &c. Had the real estate been expressly charged with payment of the debts, or the testator shown an anxious intention to have sacrificed his real estate in preference to the leasehold or his other estate, for that purpose, by the mode of disposing of his estates, such a circumstance might have been sufficient to have turned the rule of law; and it must have been appropriated to the payment of debts, let him have charged it any manner he pleased.

(*a*) Sed vide *Bootle* v. *Blundell*, 1 Mer. 227; *Bickham* v. *Cruttwell*, 1 My. & Cr. 763, and the note, post, p. 708.

When the testator purchased this leasehold estate he purchased the equity of redemption; and the mortgage

was to be considered merely as a real incumbrance upon the estate itself, and not a personal debt, as against the purchaser, according to the rules of this Court and cases decided. For *if a man purchases an equity of redemption, subject to incumbrances that shall be real incumbrance following the land, and not a personal one*, the question is, whether, by purchasing this estate, and assigning the mortgage from Mrs. Neate to Hoare, and covenanting for payment of debts, he did not make it his own debt. Had *Evelyn* v. *Evelyn*, 2 P. Wms. 659, never been decided, a fair argument might have arisen upon that head; because, where a man transfers a mortgage, and covenants for the payment of the debt according to the rule of law, he makes it his own debt, and makes himself liable to be sued upon that covenant; and such a debt has priority before other simple contract debts. Now, I do not know in what Court, or by what rule, the debt would have followed the purchaser personally: but *Evelyn* v. *Evelyn* has decided, that though he might be at law liable, yet where there are real assets sufficient for the payment of the incumbrance, they shall be applied for that purpose; and it is to be understood with respect to such transaction, that the party did it by way of accommodating the charge, and not of making the debt his own. The difference between the estate descended and purchased is nothing, unless the circumstance of purchasing creates the difference; but that affords no argument.

The next question is, whether, when he mortgages an estate of his own as an ulterior security, that circumstance would create a difference; as if, in *Evelyn* v. *Evelyn* (*a*), an additional real fund had been secured for making the debt good, that would have turned the judgment: it would not; for nothing makes it his debt so effectually as the covenant to pay; for it does not create the debt, but only operates as collateral to the debt. A man mortgages his estate without covenant, yet, because the money was borrowed, the mortgagee becomes a simple contract creditor, and in that case the mortgage is a collateral security; and if there is a bond or a covenant,

(*a*) 2 P. Wms. 659.

then there is a collateral security of a higher species, but no higher by means of the mortgage merely: therefore, having such security amounts to nothing; and I have no doubt but that if the case had been stated to the Lords Commissioners, namely, that this incumbrance was not one of the testator's debts, and did not fall upon the personal estate, that they would have considered it as inherent to the leasehold estate. The argument of its not falling upon the testator answers his real intention better. But as to the real intention, I should have agreed with the Lords Commissioners, could that intention have been made clear; but the intention does not amount to a declaration plain, in any sense in which these words have been properly applied.

For the purpose of securing property and the due administration of justice in a free country, judges ought to abide constantly by real principles, and by such beneficial rules as may afford some reasonable judgment, without applying to a superior tribunal. It is a fixed rule, that the personal estate must be first liable, unless another fund is provided; the testator must express his intention to discharge that estate from the payment of debts.

With regard to the intention apparent upon this will, it is said such intention is most anxiously limited to the raising of the term of ninety-nine years. Whether the expression be more or less, it is but subjecting the estate to the payment of debts; and it cannot extend so far as to suppose he burthened his real estate in exoneration of the personal estate. If there had been in the gift of the personal estate words of a sufficient force, according to my notion of a declaration plain, I should not have changed the force of those words; but the intent of these words, as they stand, naturally leans to subject the personal estate to the debts. With respect to the second clause, had that stood alone, I confess that would have been liable to a degree of inference; but constructions thus picked up, and collected from more circumstances than are necessary for the purpose, are not good ways of

finding out the intention of the testator; and it is better to rest upon settled rules, unless you can collect more favourable and forcible observations. With regard to the next clause, that carries more weight, because the trustees are directed to pay, not only the expense of the probate of the will, which is expressly mentioned, but to pay all the charges and expenses that should arise by proving the will, or by any other means, &c. How are these to be paid? Out of the personal estate, or the means to be raised out of the term of ninety-nine years? They have authority to pay the whole out of the personal estate —an optional clause, an empowering the executors to pay out of this fund before the other fund is ready for the purpose. He has precisely arranged the estates in the same order that the law would have done; he has made his personal estate first liable, and then the term. The true ground upon which I proceed is not upon any of these criticisms, but simply upon the rule of law, the testator not having declared by express words, or any other declaration, which would tend in law to the purpose of preserving the personal estate for any given purpose whatsoever. As to *Adams* v. *Meyrick* (*a*), that depended on the circumstance of the personal estate being a provision for the wife; and, therefore, the Court forced a construction upon the will, and it is, as Lord *Hardwicke* termed it, in *Walker* v. *Jackson*, 2 Atk. 624, a weak case: in the latter case, the republication of the will was an argument much relied upon. As to the cases determined upon the words "rest and residue," I could have wished his Lordship had decided upon them all, so as to have left a particular note upon each of them; for such determinations as those cases afford have occasioned great perplexity upon the rule of law. As to *Stapleton* v. *Colvile* (*b*), in that case the wife was executrix, and, exclusive of the context of the will, with regard to the option given to her to charge either fund, there never was a stronger case against charging the real estate; for he gives the whole real estate to the wife, and to be charged with debts; he wishes the continuance in his

(*a*) 1 Eq. Ca. Ab. 271.

(*b*) Ca. t. Talb. 202.

name and family, and yet charges it with the payment of the debts. Lord *Talbot* observed, much might arise from the examination as to the quantum of the debts and the amount of the personal estate. Lord *Talbot* took it as clear, that such an examination should be gone into. In *Stephenson* v. *Heathcote* (*a*), it is said expressly, no examination can be had. In that case, Lord Keeper *Henley* relied much upon the wife being executrix. The case was this: that the testator gave all his real estate to R. and his wife for ever, with a charge thereon for payment of debts; and, after disposing of other property, he gives a silver tobacco-box to his uncle, and all the residue he gives to his wife for ever, whom he appointed sole executrix. The Lord Keeper's observation upon this case was, that the intent of the testator was to be collected from the words of the will, and from no circumstances out of it; and, upon general principles and rules established in the cases, that the Court could not go into the testator's circumstances, as it would establish a rule not to be adhered to. The testator intended to charge his personal estate with payment of his debts, and only made his real estate an auxiliary fund: according to the rule of law, where the intent of the testator is plain, or words tantamount to express words, that is sufficient to take it out of the rule, and that it could not be the intention; for the last clause, of giving the silver tobacco-box, and then the residue to his wife, is not sufficient to show his intention to give the residue free from debts, but that the primary fund should be liable.

(*a*) 1 Eden, 38.

In the present case, I am obliged to differ from the Lords Commissioners, and consider the whole personal estate as liable to the payment of the debts; and, with respect to the leasehold estate, that the charge under which it came to the testator was prior to his purchasing it, and inherent in the estate, and the estate itself left liable to answer it, and that neither the personal estate nor real estate ought to be charged with that debt.

The judgment, ex relatione.

The rule laid down by Lord *Thurlow*, in the principal case, viz., *that the general personal estate of a testator is the primary fund for the payment of his debts, unless it be exempted by express words or manifest intent*, has been fully recognised, although the difficulty of gathering the intent, where the exoneration of the personal estate does not depend upon express words, has induced subsequent judges to join in the doubt intimated by the Lord Chancellor, of the wisdom of the departure from the older decisions, requiring express words to exempt the personal estate from its primary liability. In the case of *Watson* v. *Brickwood*, 9 Ves. 453, Sir *W. Grant* observes, "There is no reason whatsoever, either of justice or convenience, to induce me to depart from the rule laid down by Lord *Thurlow* in *The Duke of Ancaster* v. *Mayer*, requiring that, in order to exonerate the personal estate, there shall be either express words or a plain indication of that intention. Indeed, I wish the rule had been still more strict, and that nothing but express words had been permitted to alter the course and order of law. . . . . However, after the cases that have been decided, it is too late to say, it is not open to the Court to collect from the whole will an intention to exonerate the personal estate, though that intention is not expressed by any positive and exclusive words."

The rule, therefore, as to the primary liability of the personal estate does not apply when it is exempted, first, by express words of a testator: *Morrow* v. *Bush*, 1 Cox, 185; *Young* v. *Young*, 26 Beav. 522 (and on this head it will be unnecessary to make any observation): or, secondly, by his manifest intention in lieu of express words.

In considering this subject it should be always borne in mind that the burthen of proof lies on those who contend that the personal estate is exonerated: *Whieldon* v. *Spode*, 15 Beav. 539; *Lord* v. *Wightwick*, 1 Drew. 576.

It has been frequently decided, that neither a charge upon land, nor a direction to sell, nor the creation of a term for payment of debts (see *Tower* v. *Lord Rous*, 18 Ves. 132, 138; *White* v. *White*, 2 Vern. 43; *Bridgeman* v. *Dove*, 3 Atk. 201; *Lord Inchiquin* v. *French*, 1 Cox, 1; *Hancox* v. *Abbey*, 11 Ves. 186; *Rhodes* v. *Rudge*, 1 Sim. 79; *Collis* v. *Robins*, 1 De G. & Sm. 131; *Walker* v. *Hardwick*, 1 My. & K. 396; *Onseley* v. *Anstruther*, 10 Beav. 453; *Quennell* v. *Turner*, 13 Beav. 240); nor a devise of real estate, upon the condition of the devisee paying the testator's debts (*Bridgeman* v. *Dove*, 3 Atk. 201; *Meade* v. *Hide*, 2 Vern. 120; *Henry* v. *Henry*, 6 I. R. Eq. 286), will exempt the personalty from its primary liability. "It is not sufficient," says *Lord Thurlow*,

"to charge the real estate, but a testator must show that it was his purpose that the personal should not be applied:" *Samwell* v. *Wake*, 1 Bro. C. C. 145. See, also, *Bootle* v. *Blundell*, 1 Mer. 220.

And parol evidence will not be admitted to show the intention of a testator to give his personal estate free from debts; nor will any inference be drawn of the testator's intention, by a consideration of the relative amount of his personal estate and debts; nor, consequently, will any inquiry be directed in order to ascertain such relative amount: *Stephenson* v. *Heathcote*, 1 Eden, 38, overruling the cases of *Gainsborough* v. *Gainsborough*, 2 Vern. 252, and *Lady Granvill* v. *The Duchess of Beaufort*, 2 Vern. 648. See, also, *Bootle* v. *Blundell*, 1 Mer. 221, and *Tait* v. *Lord Northwick*, 4 Ves. 816. In the last case, a testator devised certain estates to trustees, upon trust, by sale or mortgage, or by sale of the timber thereon, to raise such sums of money as should be requisite to pay his debts by mortgage, bond, or by other specialty, or by simple contract, or otherwise howsoever; and, after payment of the said debts, he directed the trustees to convey the estates, or such parts thereof as should not have been disposed of, and the equity of redemption of such parts thereof, as should have been mortgaged to certain uses; and, after giving each of his trustees a legacy of 100*l.*, he gave all the rest, residue, and remainder of his personal estate whatsoever, to his two sisters equally, and he appointed two of the trustees executors. It was argued, from the state of the testator's property, his personal estate being small and inadequate for payment of his debts, that he must have intended that his real estate should be primarily liable, for otherwise his sisters would take nothing. But Lord *Loughborough*, C., held the personal estate primarily liable. "Charging the real estate," observed his Lordship, "ever so anxiously for payment of debts, will not of itself be sufficient to exempt the personal estate. I set the whole doctrine afloat, if the argument for the two sisters upon this will is allowed to prevail; for it only comes to this —there are two circumstances; one, that there is a gift of residue of the personal estate; another, that there is a very anxious charge of debts upon the real estate. Beyond that I have no ground to stand upon: all the rest of the circumstances are merely conjectural upon a supposed intention; and, it is asked, what could the testator mean by giving these sisters his personal estate, if they get nothing by it? All I say to that is, that a man giving the residue of his personal estate, does not in general mean much. It is as it may happen."

A mere charge of funeral or testamentary expenses, or of both, in addition to debts upon real estate,

will not of itself exempt the personalty: *Brydges* v. *Phillips*, 6 Ves. 570; *Stephenson* v. *Heathcote*, 1 Eden. 38; *Aldridge* v. *Wallscourt*, 1 Ball. & B. 312; *Tait* v. *Lord Northwick*, 4 Ves. 816; *Gray* v. *Minnethorpe*, 3 Ves. 103; *Hartley* v. *Hurle*, 5 Ves. 540. Sed vide *Burton* v. *Knowlton*, 3 Ves. 107, in which case, Lord *Alvanley*, M. R., considered that the direction to pay debts and funeral expenses out of a fund to arise from the sale of real estates devised to trustees who were not executors upon whom the funeral expenses would naturally fall, afforded a considerable argument that the testator did not mean the personal estate to be the fund for all those charges which naturally fall upon it, and that the residue which was given to a person for his own benefit, who was afterwards appointed executor, was specifically given, and consequently only liable as an auxiliary fund to the realty. See however, the comments upon this case by Lord *Loughborough*, C., in *Tait* v. *Lord Northwick*, 4 Ves. 823, and by Lord *Eldon*, C., in *Bootle* v. *Blundell*, 1 Mer. 229.

But where a testator throws upon his real estate all those burthens which naturally fall upon the personal estate as a primary fund, such as funeral and testamentary expenses, debts, and legacies, a strong, though not absolutely conclusive argument arises, that the testator intended to give his personalty as a specific legacy, free from those charges, and that, consequently, the realty is the primary fund for their payment: *Tower* v. *Lord Rous*, 18 Ves. 139; *Bootle* v. *Blundell*, 1 Mer. 238; *Plenty* v. *West*, 16 Beav. 173.

As to what expenses relating to real estate are properly payable out of a fund set apart to pay, amongst other things, the expenses "of the execution of the trusts of the will," see *Lord Brougham* v. *Lord William Poulett*, 19 Beav. 119; *Webb* v. *De Beauvoisin*, 31 Beav. 573; *Mulock* v. *Mulock*, 20 W. R. (M. R. Ir.) 696, overruling *Morrell* v. *Fisher*, 4 De G. & Sm. 422.

It has been determined, that an express charge of some particular debts, as simple contract debts, or legacies on the personalty for the payment of which, without such charge, it would be primarily liable, will not, according to the maxim "expressio unius est exclusio alterius," raise a presumption sufficiently clear that it is only to be the auxiliary fund for payment of other charges not expressly charged upon it, but which are charged upon the land. See *Brydges* v. *Phillips*, 6 Ves. 567, and *Watson* v. *Brickwood*, 9 Ves. 447, in which case a testator devised his real estate to a trustee upon trust for his nephews, W. W. and R. B., for life with remainders over. He then gave legacies to several nieces in blank, payable at the end of a year after his death, by his executor, and bequeathed all and singular his

goods, chattels, personal estate, and effects, whatsoever and wheresoever, not thereinbefore disposed of unto his said nephew W. W., his executors, administrators, and assigns, he paying thereout all and singular legacies, and *all his funeral expenses and simple contract debts*. The testator, then noticing that he was indebted, by *mortgages* and *bonds*, for money borrowed to pay for some of the estates he had purchased, directed that those debts should be paid by the devisees in equal proportions; and, after giving an annuity to a servant out of the real estate, *he appointed his nephew, W. W., his executor*. The will, it must be observed, does not charge the real estate with any debts; but the testator, by a codicil, appointed a trustee in the place of the one named in the will, and empowered the new trustee, "in order to raise money for the payment of *all and singular his debts and legacies*, to *mortgage*, with the approbation of the taker for the time being of his estates, a competent part of his said freehold estates, for so much money as should be necessary for that purpose; and he directed his trustees for the time being to keep down the interest;" and by another codicil he appointed another trustee, and gave other legacies. It was contended, that the personal estate was exonerated from the debts and legacies, or, at any rate, was liable only to the simple contract debts. Sir *W. Grant*, M. R., admitting that there was some indication of an intention to exonerate the personal estate, observes: "But it is not so conclusive as to come up to the requisition of the rule laid down by Lord *Thurlow*, in *The Duke of Ancaster* v. *Mayer*; that is, *a plain intention*. By directing that the executor, to whom he gives all his personal estate, shall pay thereout all the legacies, funeral expenses, and simple contract debts, primâ facie there is some appearance of an intention that he does not mean the personal estate to be liable to debts by specialty. But that alone, upon the authorities, is not sufficient." In *Bootle* v. *Blundell*, 1 Mer. 230, Lord *Eldon* says, with respect to this case, that it was rightly decided, taking the will and codicil together. "But if," said his Lordship, "the codicil had not existed, there are circumstances which appear to me to be such as might have given occasion to some observations which do not occur either in the judgment or in the argument: still, I repeat that I think that case was rightly decided." See, also, *Davies* v. *Ashford*, 15 Sim. 42.

A bequest of *all* the personal estate (with or without an enumeration of particulars), as distinguished from a mere general residuary bequest, will not, at any rate, *where the legatee is also appointed executor*, exonerate the personalty passing under such bequest, although lands are de-

vised in trust to pay all the testator's debts. See *Harewood* v. *Child*, stated Ca. t. Talb. 204; *Haslewood* v. *Pope*, 3 P. Wms. 324; *Brummel* v. *Prothero*, 3 Ves. 111; and *Aldridge* v. *Lord Wallscourt*, 1 Ball & B. 312, in which case all the personal estate was given to the executor, one of the trustees of the real estate, in trust for the legatee. The cases, therefore, of *Kynaston* v. *Kynaston*, *Holliday* v. *Bowman*, *Bamfield* v. *Wyndham*, cited in the principal case, may be considered as overruled.

The inference against the exoneration of the personal estate, when the legatee is also the executor, arises upon the assumption that he takes the personal estate in that character, with all the burthens attached to it, in a regular course of administration.

And it has been decided that the personalty will not in similar cases be exonerated where the legatee is *not* executor: *Collis* v. *Robins*, 1 De G. & Sm. 131; *Ouseley* v. *Anstruther*, 10 Beav. 453.

But, in some cases, the distinction between a mere residuary bequest, and a gift of *all* the personal estate, has been considered important. Thus, in *Tower* v. *Lord Rous*, 18 Ves. 138, Sir *W. Grant*, M. R., observed, "That there was nothing except the common residuary clause—'all the rest and residue of my personal, of what nature or kind soever;' not 'all my personal estate,' not 'all which I have not hereinbefore disposed of,' or any other of those forms which in several cases have been held to denote an intention to give the personal estate as a specific bequest." And in *Bootle* v. *Blundell*, 1 Mer. 228, Lord *Eldon*, C., with reference to the clause in the principal case, by which the testator gives to his brother "his household goods, and all other his goods, chattels, effects, and personal estate, whatsoever and wheresoever," if he should be living at the testator's decease, observes, that on those words a great deal of argument might have been raised as to the distinction between a gift of residue, as residue, and a bequest of enumerated particulars followed by the words, "and personal estate whatsoever," not "and all the residue of my personal estate:" but that such argument was put out of the question, in that case, by a subsequent clause, in which he expressly refers to this as "the devise of the residue of his personal estate."

And, accordingly, in many recent cases, where the personalty has been bequeathed, not as a residue, but as a whole, and *the debts and funeral and testamentary expenses* have been charged upon the real estate, the real estate has been held the primary fund for their payment. See *Greene* v. *Greene*, 4 Madd. 148; *Michell* v. *Michell*, 5 Madd. 69; *Driver* v.

Ferrand, 1 Russ. & My. 681; *Blount* v. *Hipkins*, 7 Sim. 43; *Jones* v. *Bruce*, 11 Sim. 221; *Coote* v. *Coote*, 9 Ir. Eq. Rep. 197; 3 J. & L. 175; *Lance* v. *Aglionby*, 27 Beav. 65; *Gilbertson* v. *Gilbertson*, 34 Beav. 354.

So where the personal estate has been bequeathed in a similar manner, and the debts, general and testamentary expenses have been thrown upon a particular real estate, devised upon trust for their payment, such particular estate will be the primary fund for their payment; and if other real estate has been specifically bequeathed, not charged with debts, such last-mentioned real estate and the personal estate (being specifically bequeathed) must contribute rateably towards the payment of the debts. See *Powell* v. *Riley*, 12 L. R. Eq. 175. There a testator bequeathed all his household goods and furniture, farming stock, money and securities for money, goods, chattels, and effects, and all other his personal estate, to his wife absolutely. He then devised a freehold estate, called the Rye Crofts, to trustees upon trust for sale, and out of the proceeds thereof to pay his debts, funeral and testamentary expenses, and the *residue* (if any) to his wife. He then devised one freehold estate to his wife absolutely, and other estates to his wife for life, with remainders over. The Rye Crofts estate was insufficient for the payment of the debts. It was held, by Sir *R. Malins*, V. C., that the bequest of the personalty to his wife was specific, that the Rye Crofts Estate, the primary fund for payment of the debts, being exhausted, the personal estate specifically bequeathed to his wife, and the two other specifically bequeathed real estates must contribute rateably to the payments of the debts remaining unpaid.

The principle, however, of these cases will not be applicable where a testator subjects his personal as well as his real estate to the payment of his debts, funeral and testamentary expenses: *Paterson* v. *Scott*, 1 De G. Mac. & G. 531.

But a testator may by implication take away the primary liability of the personal estate, if he clearly shows his intention to place it elsewhere; thus in *Webb* v. *Jones* (2 Bro. C. C. 60; 1 Cox, 245), the testator devised his real estate to be sold, and the money to arise by the sale to be applied to pay mortgages and all other debts, the residue to *be added* to his personal estate; Sir *Lloyd Kenyon*, M. R., held the personal estate to be exonerated, upon the ground, it is presumed, that the testator clearly showed that he did not contemplate the possibility of the whole personalty being applied before the realty, which it might have been if it was to be applied in its natural order. See, also,

Shallcross v. *Wright*, 12 Beav. 505; *Fisher* v. *Fisher*, 2 Kee. 610.

Again, where a testator devised an estate at Charleywood, and bequeathed certain specific chattels, upon trust to sell, and in the first place to pay all his just debts, funeral and testamentary expenses and legacies, and after giving some pecuniary legacies, the testator declared that the moneys to arise by such sale as aforesaid, *should be "the fund primarily applicable* to the discharge of his said debts, funeral and testamentary expenses and legacies." And in case it should be insufficient, the testator by a codicil charged his Highbury estate "with the payment of so much money as should be requisite to make good the deficiency;" it was held by Sir *J. Leach*, M. R., that the personal estate was only liable after the two estates had been exhausted. "It is not necessary," said his Honor, "that there should be words expressly exempting the personal estate, if the instruments afford a clear intention on the part of the testator that it should be exempted. The Charleywood estate and the articles to be sold therewith, are expressed to be the primary fund, and the plain intention of the testator is, that the Highbury estate should be the secondary fund:" *Dawes* v. *Scott*, 5 Russ. 32. See, also, *Forrest* v. *Prescott*, 10 L. R. Eq. 545. There a testatrix gave her real estate in trust for her two daughters, I. MacCarty and M. Streffi, for life, and afterwards each moiety was to go to the sons of each of her daughters and their families; and after giving various legacies she left the residue of her estate to her granddaughters. By a codicil the testatrix directed that certain debts incurred by her, for her son-in-law, J. MacCarty, should be exclusively, and in the first instance, borne by and paid out of the MacCarty moiety of her real estate, exempting the Streffi moiety from payment of such debts. It was held by Sir *R. Malins*, V.-C., that the codicil amounted to an express exoneration of the personal estate of the testatrix; and that the moiety of her real estate devised to the MacCarty family was primarily liable to the debts. See, also, *March* v. *Fowke*, Rep. t. Finch, 414; *Bateman* v. *Earl of Roden*, 1 J. & L. 356; *Evans* v. *Evans*, 17 Sim. 106; and *Bootle* v. *Blundell*, 1 Mer. 193; 19 Ves. 494.

And where a testator expressly exempts his personal estate from payment of his debts, estates specifically devised not charged with payment of debts will be applicable after real estates devised upon trust for their payment, and before resort can be had to the personal estate: *Morrow* v. *Bush*, 1 Cox, 185; *Young* v. *Young*, 26 Beav. 522.

It seems where the testator has

exempted personalty which he has bequeathed from its primary liability to debts, that the exemption will not be extended for the benefit of next of kin who take the personalty in consequence of a lapse. In *Waring* v. *Ward*, 5 Ves. 675, Lord *Loughborough*, C., puts this case. "If an estate be given to A. and the personal estate to B. exempt from debts, that exemption is to be considered as intended only for the benefit of B., that he shall not pay those debts to which he would be liable if no such provision had been made; and it is not a general exemption of the personal estate. . . Nothing can be more clear than that where an exemption is created for the benefit of a particular person, not for the benefit of the estate generally, if that person cannot take it, the benefit never arises." See also *Hale* v. *Cox*, 3 Bro. C. C. 322; *Hancox* v. *Abbey*, 11 Ves. 179; *Noel* v. *Lord Henley*, 7 Price, 241; Dan. 211; but see and consider *Milnes* v. *Slater*, 8 Ves. 295—305; *Fisher* v. *Fisher*, 2 Kee. 610.

No inference of an intention to exonerate the personalty arises from the appointment of an executor, who, there being no bequest of the personalty, was entitled to it by such nomination, although the debts and funeral expenses are thrown upon the land (*Gray* v. *Minnethorpe*, 3 Ves. 103, 104); nor where he is a trustee of it for the next of kin (*M'Cleland* v. *Shaw*, 2 S. & L. 538, 543); upon the principle, that there is no specific disposition of the residuary personal estate.

But it is clear that the executor may take the personal estate, either beneficially or as trustee for the next of kin, exonerated from the payment of debts and legacies, if another fund is provided for their payment, and the personalty has, by express words, been exempted: *Milnes* v. *Slater*, 8 Ves. 305.

Where there is a simple gift of an annuity or legacy, followed by a charge thereof upon the real estate, the personal estate in such case is primarily liable, and the real estate is only charged in aid of the personal estate. See *Paget* v. *Huish*, 1 Hem. & Mill. 663, 667.

So where there is a general charge of *legacies* upon land, or a devise in trust to pay *legacies* generally, the personal estate will be the primary fund for their payment; as if A. devised real estate upon trust to sell and pay legacies, and afterwards gave B. a legacy of 1000*l.*, A.'s personal estate will be the primary, his real estate the auxiliary fund only for its payment: *Kirke* v. *Kirke*, 4 Russ. 449.

But the will may show an intention to make legacies primarily payable out of another fund: *Greaves* v. *Powell*, 2 Vern. 248; *Boughton* v. *Boughton*, 1 H. L. Cas. 406; *Whieldon* v. *Spode*, 15 Beav. 537; *Lance* v. *Aglionby*, 27

Beav. 65. In *Woodhead* v. *Turner*, 4 De G. & Sm. 429, it was held upon the language of the will, that an annuity was primarily payable out of specifically devised real estates. And see *Ion* v. *Ashton*, 28 Beav. 379; *Daunt* v. *Daunt*, 13 Ir. Ch. Rep. 175; *Allan* v. *Gott*, 7 L. R. Ch. App. 439; *Weldon* v. *Bradshaw*, 7 I. R. Eq. 168.

Where there is a trust to pay particular sums out of real estate, as if A. devise real estate to B. upon trust to pay 1000*l.* to C. such sum is considered as part of the real estate, and the personal estate will not, even upon a deficiency of the real estate, be liable to the payment of it (*Spurway* v. *Glynn*, 9 Ves. 483; *Hancox* v. *Abbey*, 11 Ves. 179; *Gittins* v. *Steele*, 1 Swanst. 24; *Lamphier* v. *Despard*, 2 D. & W. 59; 1 C. & L. 200; *Dickin* v. *Edwards*, 4 Hare, 273; *Bateman* v. *Lord Roden*, 7 Ir. Eq. Rep. 240, 1 J. & L. 368; *Jones* v. *Bruce*, 11 Sim. 221; *Ashby* v. *Ashby*, 1 Coll. 549; *Roberts* v. *Roberts*, 13 Sim. 336; *Evans* v. *Evans*, 17 Sim. 102; *Coard* v. *Holderness*, 22 Beav. 391; *Gordon* v. *Duff*, 28 Beav. 519); and should the testator sell the estate out of which the sum is to be paid, the legacy will be adeemed: *Newbold* v. *Roadnight*, 1 Russ. & My. 677.

Where, however, the legacy appears to be a demonstrative legacy, there the fund pointed out for its payment, whether real or personal, is primarily liable, but upon its failure the demonstrative legacy will be payable out of the general assets. *Savile* v. *Blacket*, 1 P. Wms. 778; *Attorney-General* v. *Parkin*, Amb. 566; *Cartwright* v. *Cartwright*, cited 2 Bro. C. C. 114; *Roberts* v. *Pocock*, 4 Ves. 150; *M'Cleland* v. *Shaw*, 2 S. & L. 538; *Smith* v. *Fitzgerald*, 3 Y. & B. 2; *Walker* v. *Laxton*, 1 Y. & J. 557; *Mann* v. *Copland*, 2 Madd. 232; *Fowler* v. *Willoughby*, 2 S. & S. 354; *Wilcox* v. *Rhodes*, 2 Russ. 452; *Colville* v. *Middleton*, 3 Beav. 570; *Fream* v. *Dowling*, 20 Beav. 624; 4 L. R. Eq. 145 n.; *Williams* v. *Hughes*, 24 Beav. 474; and see note to *Ashburner* v. *Macguire*, vol. ii. post.

But it appears that a devise of real estate, upon trust to raise a certain sum for payment of debts (*Clutterbuck* v. *Clutterbuck*, 1 My. & K. 15), or to pay a particular debt to which the personal estate is also liable, will render the real estate the primary fund for the payment of such sums: *Hancox* v. *Abbey*, 11 Ves. 179; *Welby* v. *Rockcliffe*, 1 Russ. & My. 571; *Evans* v. *Cockeram*, 1 Coll. 428; *Bateman* v. *Earl* of *Roden*, 1 J. & L. 356; *Coote* v. *Coote*, 3 J. & L. 178. Sed Vide *Noel* v. *Lord Henley*, 7 Price, 241; *S. C.*, Dan. 211. There *Richards*, C. B., observed, "That he could not make any distinction between a direction that real estate should be chargeable with a particular debt of 20,000*l.*, and a devise of real estate subject to all the testator's debts; for the

20,000*l.* was only part of those debts." See, however, the remarks on this case in Lord *St. Leonards'* work on the Law of Property, p. 363.

Where a *specific* personal fund is subjected to charges (which otherwise would fall upon the general personal estate), as debts, legacies, funeral and testamentary expenses, such specific fund will not be the auxiliary, but the primary source for their payment. (See *Browne* v. *Groombridge*, 4 Madd. 495; *Choat* v. *Yeates*, 1 J. & W. 102; and see *Phillips* v. *Eastwood*, 1 L. & G. t. Sugd. 294; *Evans* v. *Evans*, 17 Sim. 106; *Webb* v. *De Beauvoisin*, 31 Beav. 573; *Gilbertson* v. *Gilbertson* 34 Beav. 354; *Coventry* v. *Coventry*, 2 Drew. & Sm. 470); except when the residue is undisposed of, in which case it will be primarily liable. Thus, in *Hewett* v. *Snare* (1 De G. & Sm. 333), where a testator had bequeathed specific chattels to his widow, charged with payment of a pecuniary legacy and of all his just debts and funeral and testamentary expenses, and bequeathed other specific and pecuniary legacies, *but made no residuary bequest*, it was argued that, if it could be construed as a charge, only in the event of the general residue being insufficient, the words would be inoperative: and *Choat* v. *Yeates* (1 J. & W. 102) and *Browne* v. *Groombridge* (4 Madd. 495) were cited. Sir *J. L. Knight Bruce*, V.C., said, that "in both those cases there was a residuary bequest. In the case then before the Court, the words of the will would not be inoperative if they were construed as charging the property bequeathed to his widow in preference to other specific legacies, but not in preference to undisposed of residue." And his Honor was of opinion that there was not a sufficient indication of an intention to exonerate the residuary estate. See also *Holford* v. *Wood*, 4 Ves. 76; *Newbegin* v. *Bell*, 23 Beav. 386; *Corbet* v. *Corbet*, 8 I. R. Eq. 407.

Although the payment of debts is thrown by a testator upon a particular fund, and he devises or bequeaths other property discharged from such debts, if the particular fund should prove insufficient for payment of debts, the other property will be applicable for that purpose in the usual order. See *Lord Brooke* v. *Earl of Warwick*, 1 H. & T. 142; there a testator devised an estate (which he had mortgaged), and bequeathed specific personal property, and his residuary personal estate, to different persons, *freed and discharged* from his debts, &c., and he devised real estate to trustees, upon trust to sell and pay his debts. The estate devised for payment of debts was insufficient for that purpose. It was held by Lord *Cottenham*, C., affirming the decision of Sir *J. L. Knight Bruce*, V.-C. (reported 2 De G. & Sm.

425), that the residue was primarily liable, and that the devisees of the mortgaged estates were entitled to exoneration thereout. "The only way," said his Lordship, "in which this case was attempted to be argued was this; that the gift of the residue was a specific gift. This is founded on the supposition that the testator has disposed of it as a particular fund. There may be many cases where residuary clauses must be considered, not as general dispositions of the residue, but as dispositions of the residue of a particular fund; and such gifts would be equally specific with gifts of other parts of the fund. In an ordinary gift of the residue, part to A. and part to B., and the residue to C., C. is as much a specific legatee as either of the former legatees A. or B. But this is a general gift of the residuary estate. What, then, is a residuary estate? That which remains after payment of the debts. The testator gives it discharged from his debts; but he cannot do that, unless he provides for the payment of them by other means. Therefore, if he has expressed an intention of doing what he is incapable of effecting, it must fail." See also *Powell* v. *Riley*, 12 L. R. Eq. 175.

When mortgaged estates are entitled to be exonerated.]—The law upon this subject has been materially altered by Locke King's Act (17 & 18 Vict. c. 113) amended by 30 & 31 Vict. c. 69, which, however, only affects the rights of those claiming under a person dying after the 31st of December, 1854. It is proposed, therefore, to consider, first, the law as applicable to cases not coming within the Act; and then to notice the Act itself, and the alterations which it has effected.

First, then, as to cases not coming within the operation of the Act: it is clear in accordance with the general rule, by which the personal estate is the primary fund for payment of debts, unless by express words or manifest intent it is exempted, that the personal estate is the primary fund for payment of a mortgage debt *contracted by a deceased person himself;* and, whether the estate descends or is devised, the heir-at-law in the one case, and the devisee in the other, is entitled to have the land exonerated from the mortgage debt by the primary application of the general personal assets, so far as they will extend, unless, in the case of a devise, it appears from the will to have been the testator's intent that the land should be taken cum onere. See *Davies* v. *Bush*, 4 Bligh, N. S. 305, and note.

As to the right of a married woman, who for the benefit of her husband has mortgaged her estate, to have it exonerated out of her husband's estate, see *Huntington* v. *Huntington*, 2 Vern. 437;

2 Bro. P. C. 1, Toml. Ed.; and 2 L. C. Eq. and note.

Although, as before observed, a devise or charge for payment of debts generally, will not render the real estate primarily liable, it seems that a devise of land in mortgage, charged with, or in trust to sell for, payment of the mortgage debt, although it be the testator's own debt, will show his intention to exonerate the personalty, and render the mortgaged estate primarily liable: *Evans* v. *Cockeram*, 1 Coll. 428; *Hancox* v. *Abbey*, 11 Ves. 179. So where there is a devise to a person of an estate "he paying the mortgage thereon:" *Lockhart* v. *Hardy*, 9 Beav. 379. Sed vide *Mead* v. *Hide*, 2 Vern. 120; *Bridgeman* v. *Dove*, 3 Atk. 201.

But a devise *subject* to the mortgage or incumbrance thereon, is not considered indicative of an intention to render the real estate primarily liable, but merely descriptive of the state of the property; it will not, therefore, exonerate the personal estate: *Serle* v. *St. Eloy*, 2 P. Wms. 386; *Astley* v. *The Earl of Tankerville*, 3 Bro. C. C. 545; *S. C.*, 1 Cox, 82; *Milnes* v. *Slater*, 8 Ves. 306; *Bootle* v. *Blundell*, 1 Mer. 227; *Noel* v. *Lord Henley*, Dan. 336; *Goodwin* v. *Lee*, 1 K. & J. 377. See also *Wythe* v. *Henniker*, 2 My. & K. 635; *Bickham* v. *Cruttwell*, 3 My. & Cr. 763; *Townshend* v. *Mostyn*, 26 Beav. 72, 76; *Newhouse* v. *Smith*, 2 Sm. & Giff. 344.

In the principal case, indeed, Lord *Thurlow* says, that, as the testator had positively given the leasehold estate *subject* to the debt thereon, if another estate had been appropriated to payment of his debts, and it had been *his debt* upon the estate, he should have concurred with the Lords Commissioners in thinking the debt a primary charge on the estate. But Lord *Eldon* has observed, in *Bootle* v. *Blundell*, 1 Mer. 227, with reference to the remark of Lord *Thurlow*, that "if, in *The Duke of Ancaster* v. *Mayer*, the mortgage debt of 6500*l.* upon the leasehold estate devised to the testator's brother, had been a debt of the testator's *own*, it seems to be very certain, from *Serle* v. *St. Eloy*, 2 P. Wms. 386, and other cases, that his giving the leasehold estate *subject* to the mortgage would not have constituted it the primary fund for payment of that debt." See, also, *Galton* v. *Hancock*, 2 Atk. 437; *Astley* v. *Tankerville*, 3 Bro. C. C. 545; 1 Cox, 82; *Bickham* v. *Cruttwell*, 3 My. & Cr. 763.

A vendor's lien is such a personal debt due from the purchaser, as would (prior to recent legislation, see post 717) entitle his heir or devisee to have the estate upon which it is a charge exonerated by the primary application of the purchaser's general personal estate. So, if a person bought an estate, and thereby contracted a debt with the vendor, and, for the purpose of securing it,

gave a charge on the estate, and entered into a covenant to pay it, it would be the personal debt of the purchaser, and his personal estate would be primarily liable to pay it. And it would make no difference whether the purchase-money was to be paid in a gross sum or from time to time, by way of annuity for life ; it was equally a debt and charge upon the personal estate, and in either case the personal estate was the primary fund to pay it : *Yonge* v. *Furse*, 20 Beav. 380, 383.

Where, however, there has been no benefit from a charge to the personalty of a party creating it, the case will not fall within the general rule. Thus, where the money due upon mortgage is a mere charge, in order to secure a portion or jointure, although accompanied by a covenant to pay on the part of the owner of the estate, it will be held to be a debt to which the estate charged, and not the personal estate, will be primarily liable. See *Coventry* v. *Coventry*, 2 P. Wms. 222, 1 Stra. 596; *Edwards* v. *Freeman*, 2 P. Wms. 437 ; *Lanoy* v. *The Duke of Athol*, 2 Atk. 444 ; *Lechmere* v. *Charlton*, 15 Ves. 193 ; and *Loosemore* v. *Knapman*, Kay, 123 : there a man by his marriage settlement covenanted to secure his intended wife an annuity by way of jointure " in manner thereinafter expressed," and he demised certain real estate to trustees for a term, upon the trusts thereinafter declared ; and then covenanted that his heirs, executors, administrators, or assigns should pay the jointure to the wife, and it was thereby declared that the demised lands were to be held upon trust for the settlor until some default in making any of the payments of the jointure ; and in case of nonpayment of any part for forty days next after any day of payment, then upon trust to secure the same. It was held by Sir *W. P. Wood*, V. C., that as between the real and personal representatives of the settlor the land was the primary fund for the payment of the jointure. " I think," said his Honor, " there is a distinction to be found in the cases ; that I am bound in principle to hold that this is a charge primarily on the real estate. First of all, there is a decision of Lord *Hardwicke* in *Lanoy* v. *The Duke of Athol*, 2 Atk. 444. I believe there are prior cases, but that is the leading case on the subject. He says in effect that although where there is a covenant for payment the personal assets are first charged, this is not extended to provisions in a settlement, and the ground must be that pointed out in *Lechmere* v. *Charlton*, 15 Ves. 193, that in a security of this description *there is not any benefit accruing to the personal estate of the party who is debtor*, but the whole arrangement is merely for the purpose of securing a jointure or portion.

and *the personalty not having received any benefit*, the true intent is that the real, and not the personal estate should be the primary fund. That was the ground of the decision in *Graves* v. *Hicks*, 6 Sim. 398. In that case there was an agreement to secure a sum of 6000*l.* by way of mortgage, and the Vice-Chancellor takes a distinction which is nice, but of some importance as to what would have been the effect if the wording there had been different—if it had been an agreement to *pay*, and not to *secure*, the 6000*l.* The use of the word '*pay*' might have been evidence of an anterior debt, as the question was, whether it was a debt at the time of the settlement. . . . . I rely upon the decision of *Lanoy* v. *The Duke of Athol*, and the view which the Vice-Chancellor took in asking in *Graves* v. *Hicks*, whether any debt was due at the time? Asking the same question here, and it appearing that there was no debt, and no augmentation of the personal estate, I must hold, according to the authorities, that the transaction is to be regarded as a security made by the settlor upon his marriage, in which his personal estate taking no benefit, the onus is thrown upon those who wish to make it liable to show some reason for doing so." See the remarks of *Lord Truro*, C., in *Hickling* v. *Boyer*, 3 Mac. & G. 642, 943; and see and consider *Reeve* v. *Reeve*, 3 De G. & Sm. 714; *Evans* v. *Wyatt*, 31 Beav. 217.

But even where the personal estate has received a benefit, the real estate will be primarily liable where a tenant for life, even although he has an absolute power of appointment over the whole estate, raises a sum of money under the power for his own use, and covenants to pay it: for the inference in such a case is, that he intended the real estate, which was not absolutely his own, should pay the debt in preference to his own property: *Jenkinson* v. *Harcourt*, Kay, 688, 700; and see *Dolphin* v. *Aylward*, 15 Ir. Ch. Rep. 583. As to what would be the effect of the tenant for life becoming absolute owner by the failure of intermediate limitations, see *Scott* v. *Beecher*, 5 Madd. 96; *Lord Ilchester* v. *Lord Carnarvon*, 1 Beav. 209; *Noel* v. *Lord Henley*, Dan. 331; 332; *Earl of Clarendon* v. *Barham*, 1 Y. & C. C. C. 788.

Where a person has raised money by mortgage of an estate, which he afterwards aliens or settles upon volunteers, and more especially if he does so expressly subject to the mortgage, the natural inference from such a transaction, unless there be something in the instrument to indicate a contrary intention, is that the alienor or settlor did not mean to pay the debt out of his personal estate. If the alienation be made subject to the mortgage

debt, whether the alienee be a volunteer or purchaser, the inference is, that though as between the real and personal representatives of the mortgagor, his real estate was intended to be only a collateral security, yet from the moment of alienation he has made that estate the principal debtor (*Vandeleur* v. *Vandeleur*, 3 C. & F. 82; 9 Bligh, N. S. 157; *Lewis* v. *Nangle*, 1 Cox, 240; *Ibbetson* v. *Ibbetson*, 12 Sim. 206; *Lady Langdale* v. *Briggs*, 8 De G. Mac. & G. 391); and if he were to pay off the whole or any part of the charge upon the real estate, he would, unless he showed that he intended to make the payment in ease of the real estate, be a creditor for the amount he so paid off (*Ex parte Digby*, Jac. 235; *Redington* v. *Redington*, 1 B. & B. 131; *Vandeleur* v. *Vandeleur*, 3 C. & F. 82; 9 Bligh, N. S. 157); but where the settlement contains a covenant on the part of the settlor to pay the debt, that might show his intention to render his personal estate primarily liable. See *Noel* v. *Noel*, 12 Price, 263, 264; *Barham* v. *Earl of Clarendon*, 10 Hare, 126.

Where, moreover, the mortgage debt *is not the personal debt of the devisor or ancestor*, but of a previous owner of the mortgaged estate, the mortgaged estate is the primary, and the personal estate merely the auxiliary and collateral fund for its payment; and consequently the heir-at-law or devisee, will take such estate cum onere, unless the mortgage debt has *been adopted* by the devisor or ancestor as his own, in which case the rule, that the personal estate is the primary fund for its payment applies: *Scott* v. *Beecher*, 5 Madd. 96. And see *Earl of Clarendon* v. *Barham*, 1 Y. & C. C. C. 688.

What acts do not amount to an adoption of a mortgage debt by the owner of the estate.]—There is considerable difficulty in ascertaining what acts amount to an adoption of the debt. The following acts have been held not to be sufficient:—If the heir or devisee, upon a transfer of the mortgage, enters into a personal covenant with, or executes a bond to, the new mortagee for the payment of the mortgage debt, if he does it only for that purpose, it has been frequently determined not to make it the personal debt of the party whose original debt it was not (*Bagot* v. *Oughton*, 1 P. Wms. 347; *Evelyn* v. *Evelyn*, 2 P. Wms. 664; see Cox's note *Leman* v. *Newnham*, 1 Ves. 51; *Lacam* v. *Mertins*, 1 Ves. 312; *Robinson* v. *Gee*, 1 Ves. 251; *The Earl of Ilchester* v. *The Earl of Carnarvon*, 1 Beav. 209; *Hedges* v. *Hedges*, 5 De G. & Sm. 330; and see and consider *Barham* v. *Earl of Thanet*, 3 My. & K. 607; *Bruce* v. *Morice*, 2 De G. & Sm. 389);—nor if, as in the principal case, he obtains a *small* further advance, and gives an additional real security for the whole sum due;—nor where he

enters into a covenant to pay a higher rate of interest (*Shafto* v. *Shafto*, 2 P. Wms. 664, n.; 1 Cox, 207; sed vide *Woods* v. *Huntingford*, 3 Ves. 128; *Lushington* v. *Sewell*, 1 Sim. 435):—nor where he obtains an additional advance to pay off arrears of interest on a mortgage and the simple contract debts of the person from whom he takes the estate (*Earl of Tankerville* v. *Fawcett*, 1 Cox, 237);—nor will a mortgage by the heir or devisee of lands, devised or descended, subject to payment of the debts or legacies of the ancestor or devisor, in order to secure their debts or legacies, be considered as the debt of the heir or devisee: *Perkyns* v. *Baynton*, 2 P. Wms. 665, Cox's note; *Basset* v. *Percival*, 1 Cox, 268; *Noel* v. *Lord Henley*, 7 Price, 241; *S. C.*, Dan. 211; *Hamilton* v. *Worley*, 2 Ves. jun. 62; *Earl of Tankerville* v. *Fawcet*, 1 Cox, 237, 2 Bro. C. C. 57. Nor will a charge by an heir or devisee of his estate with payment of his debts be considered as an adoption of the mortgage debt of his ancestor or the devisor from whom he took the estate: *Lawson* v. *Lawson*, 3 Bro. P. C. Toml. Ed. 424; *Hamilton* v. *Worley*, 2 Ves. jun. 62, 4 Bro. C. C. 199; *Lawson* v. *Hudson*, 1 Bro. C. C. 58.

Where a man buys subject to a mortgage, and has no connection, or contract, or communication with the mortgagee, and does no other act to show an intention to transfer the debt from the estate to himself, as between his heir and his executor, but merely that which he must do if he pays a less price for it in consequence of that mortgage—that is, indemnifies the vendor against it—he does not, by that act, take the debt upon himself personally: *Woods* v. *Huntingford*, 3 Ves. 132, per Sir *R. P. Arden*, M. R.: and although he agrees or covenants with the vendor to pay the mortgage debt, he does not thereby make it his own debt, but it remains a charge upon the estate, or rather a debt of his in respect of the estate only: *Tweddell* v. *Tweddell*, 2 Bro. C. C. 101, 152; *Butler* v. *Butler*, 5 Ves. 534; *Barry* v. *Harding*, 1 J. & L. 475. Sed vide *Parsons* v. *Freeman*, 2 P. Wms. 664, Cox's note.

What acts amount to an adoption of a mortgage debt by the owner of the estate.]—The following acts have been held to amount to an adoption of the debt:—Where the owner of property adds mortgages of his own to other mortgages created by his ancestor, and unites them together, and makes himself personally liable for the payment of the aggregate sum, the whole mortgage debt then becomes his debt: *Townshend* v. *Mostyn*, 26 Beav. 72, 76: and see *Bagot* v. *Bagot*, 34 Beav. 134; 10 Jur. (N. S.) 1169; 13 W. R. (M. R.) 169.

Where the purchaser of the

equity of redemption enters into a covenant with the *mortgagee* to pay *him* the mortgage debt, and there is a new proviso for redemption on payment, he will be considered to have adopted the debt as his own: *Earl of Oxford* v. *Lady Rodney*, 14 Ves. 417; *Woods* v. *Huntingford*, 3 Ves. 128; *Barry* v. *Harding*, 1 J. & L. 485, 486.

But although the mere purchase of an estate subject to charges as an equity of redemption, does not make the personal estate of the purchaser liable to the charge, if the charge is part of the price, then the personal estate is liable. —Per Lord *Thurlow*, C., in *Billinghurst* v. *Walker*, 2 Bro. C. C. 608, recognising the doctrine laid down in *Cope* v. *Cope*, Salk. 449; and *Belvidere* v. *Lord Rochfort*, Wallis Rep. by Lyne, 45; 5 Bro. P. C. 299, Toml. Ed. Sed vide *Tweddell* v. *Tweddell*, 2 Bro. C. C. 107, where Lord *Thurlow* disapproves of that case. See also *Woods* v. *Lord Huntingford*, 3 Ves. 131. And see and consider *Waring* v. *Ward*, 7 Ves. 337; *Barry* v. *Harding*, 1 J. & L. 475.

Election by devisee and mortgagee that mortgage should be a charge on the real estate.] — Where a mortgaged estate comes into the hands of a person who is executor and residuary legatee of the mortgagor, as well as heir or devisee of the mortgaged estate, upon the death of such person the mortgage debt is a primary charge on the real estate. The leading case upon this subject is *Scott* v. *Beecher*, 5 Madd. 96; there the owner of copyholds, which he had mortgaged, devised them to his wife in fee, and gave to her his personal estate, and made her his residuary legatee and executrix. The wife died intestate without paying off the mortgage. It was held by Sir *John Leach*, V.-C., that her heir was not entitled to have the mortgage paid out of the personal estate. "The widow," said his Honor, "was devisee of the copyhold estate, and was also residuary legatee and executrix of the mortgagor. If she had thought fit, she might have paid off the mortgage out of the personal estate of her husband, for it is admitted she possessed assets sufficient to pay all the debts, including the mortgage, and *it may therefore be said that she elected to continue the mortgage as a charge on her real estate.* But I apprehend this is not a case in which her personal representative is bound to make out any such fact of election. By the gift to her as residuary legatee, the personal estate of the testator became her personal estate, but the mortgage debt of the testator was not her debt, and her heir therefore has no equity to pay off this mortgage out of her personal estate." So likewise in the recent case of *Swainson* v. *Swainson*, 6 De G. Mac. & G. 648, a testator who had mortgaged his estates,

gave all his real and personal estate to his wife, and made her executrix. She died without having paid off the mortgagees. It was held by Lord *Cranworth*, C., affirming the decision of Sir *J. Stuart*, V.-C., that her heir took the mortgaged estates cum onere. "Some propositions," said his Lordship, "connected with the case admit of no doubt. If the owner of an estate mortgaged it and died, and the representative of his real estate was a different person from the representative of his personal estate, in this case the real estate would be exonerated from the debt at the expense of the personalty. Again, where the real and personal representative of the mortgagor was the same person, no question could arise. What, however, was to happen if the estate having come to some person, that person died, and his representatives were different, his real estate going to one person and his personal to another? It was here that the question arose. Without saying whether there might be a preference in favour of the rule being one way rather than another, the only point of importance was that some rule should be established. I have always understood the rule to be that when an estate in mortgage had once come to the hands of a person filling the character both of real and personal representative of the mortgagor, then the charge became a debt of that person, and was only an incumbrance on the estate. That was the rule laid down in *Scott* v. *Beecher*, and it was acted on by Lord *Lyndhurst* in *Evans* v. *Smithson* (cited 1 Y. & C. C. C. 701). The particulars of that case were not known, but the rule was also followed by Lord *Langdale* in *The Earl of Ilchester* v. *The Earl of Carnarvon*, 1 Beav. 209; and again, although with reluctance, by the present Lord Justice *Knight-Bruce* in *The Earl of Clarendon* v. *Barham*, 1 Y. & C. C. C. 688; it was again recognised and followed by Lord *Truro* in *Hickling* v. *Boyer*, 3 Mac. & G. 635, 644."

It has, however, been recently decided that where the same person becomes entitled to the mortgaged estate, and also to the personal estate of the mortgagor upon his intestacy, on the death of such person intestate, without having taken out letters of administration, his heir will be entitled to have the mortgaged estate exonerated. See *Bond* v. *England*, 2 K. & J. 44; there James England mortgaged real estate, and died intestate in 1850, leaving his father, Edward England, heir-at-law, and sole next of kin. Edward England died intestate, and without having obtained letters of administration of the personal estate of his son. It was held by Sir *W. Page-Wood*, V.-C., that the personal estate of the son was liable, as between the heir and

personal representative of the father and son, to be applied in discharge of the mortgage debt in exoneration of the real estate. "It appears to me," said his Honor, "that the authorities which have decided that when the same person who is heir or devisee of the mortgaged estate is also executor and residuary legatee, and has both the funds and the legal right to pay himself, his heir is not entitled to have the mortgaged estate exonerated, do not go far enough to enable me to hold that the administrator of Edward, who was entitled only to so much of the entire personalty of James as fell to him by the effect of intestacy after all the debts of James were paid, can claim James's personalty until the mortgaged debt is discharged, or to hold even if the mortgagee had chosen to sell the security, so that the debt had been in a manner discharged, that the defendant, claiming as heir of James as well as of Edward, has not a right to say 'the personalty of James never came to Edward, it remains unadministered, and I am entitled to have it applied in relieving the mortgaged estate from James's debt.' The case is new in this particular. The views on the general doctrine have been very various; but the latter decisions have proceeded upon the ground that the same party had both funds under his control. I cannot say that this was the case here, and I must therefore decide in favour of the defendant, who applies to have the mortgaged estate exonerated."

In *Hatch* v. *Skelton* (20 Beav. 453), a testatrix, the owner of a freehold estate, subject to a mortgage in fee to secure 1300*l.*, devised and bequeathed her real and personal estate to Angell, the *mortgagee*, who, in his residuary account as her executor, represented the balance of the estate as being 467*l.*, and added, "The executor will appropriate this balance towards payment of the mortgage of 1300*l.* due to himself." Afterwards Angell devised the estate to a niece and two sisters of the testatrix, "provided they undertake to receive the same with all the liabilities attaching thereunto." It was held by Sir *John Romilly*, M. R., first, that under the circumstances the mortgage had not merged in the fee; and, secondly, that the niece and two sisters of the testatrix took the estate subject to the payment of the balance of the mortgage debt. See also *Byam* v. *Sutton*, 19 Beav. 556.

As to the effect of lapse of time upon the claim to exoneration, see *Newhouse* v. *Smith*, 2 Sm. & Giff. 344; *Rooke* v. *Lord Kensington*, 21 Beav. 470; *Mellersh* v. *Bridger*, 17 Jur. 908.

The law of the exoneration of mortgaged estates as altered by statute.]—The law relating to the

exoneration of mortgaged estates having been found unsatisfactory, it was enacted by Locke King's Act (17 & 18 Vict. c. 113—which does not extend to Scotland), that "when any person shall, after the 31st of December, 1854, die seised of or entitled to any estate, or interest in *any land or other hereditaments* which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will, deed, or other document, *have signified any contrary or other intention, the heir or devisee* to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: *Provided* always that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid, or otherwise: *provided* also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January one thousand eight hundred and fifty-five." (Sect. 1.)

It will be observed that this Act only comprehends "any estate or interest in any land or other hereditaments;" the law, therefore, under that Act, remained unaltered as to the primary liability of the general personal estate, to satisfy charges on property not coming within those terms.

With regard to property the mortgage of which comes within the Act, it seems that copyholds as well as freeholds are within its provisions (*Piper* v. *Piper*, 1 J. & H. 91); but leaseholds for years are, by the language of the Act, which speaks of "the *heir* or *devisee* to whom such lands or hereditaments shall *descend* or be *devised*" (words not applicable to leaseholds for years), excluded from its operation, *Solomon* v. *Solomon*, 12 W. R. 540, 10 Jur. N. S. 331; 33 L. J. (Ch.) 473; *In re Wormsley's Estate*, 4 Ch. D. 665. But, by a bill of the Lord Chancellor now before Parliament, the Act is to be extended to lands and hereditaments of all tenures.

It seems, however, that land devised upon trusts for conversion, and taken in its converted state, is not an interest in lands within the meaning of Locke King's Act:

Lewis v. *Lewis*, 13 L. R. Eq. 218.

With regard to the question, as to what is a sum charged by way of mortgage within the meaning of the Act (17 & 18 Vict. c. 113), it has been decided that the Act only applies where there is a defined and specified charge on a specified estate (*Hepworth* v. *Hill*, 30 Beav. 476): that it applies to an equitable mortgage of freeholds, by deposit of deeds with (*Pembrooke* v. *Friend*, 1 J. & H. 132; *Coleby* v. *Coleby*, 2 L. R. Eq. 803), or without a memorandum: *Davis* v. *Davis*, W. N. 1876, p. 242. A vendor's lien, however, was held not to be within the Act: *Hood* v. *Hood*, 26 L. J. (N. S.) Ch. 616; *Barnwell* v. *Iremonger*, 1 Drew. & Sm. 255, 260. But by the Real Estate Charges Amendment Act (30 & 31 Vict. c. 69), it was enacted that in the construction of the former Act (17 & 18 Vict. c. 113), and of this Act, 30 & 31 Vict. c. 69, the word "mortgage" shall be deemed to extend to any lien for unpaid purchase-money, upon any lands or hereditaments purchased by a *testator*.

But, by a Bill of the Lord Chancellor now before Parliament, the Act is to be extended to a lien upon any lands or hereditaments purchased by an intestate.

It having been enacted in general terms by 17 & 18 Vict. c. 113, that the "mortgage debt shall not be discharged or satisfied out of the personal estate or any other real estate," the generality of those expressions is not limited by the words "as between the different persons claiming through or under the deceased person," and they have been held to apply in favour of the Crown, claiming personalty for want of next of kin: *Daere* v. *Patrickson*, 1 Drew. & Sm. 186.

With regard to the operation of the last proviso in the same Act, it has been decided that an heir taking *by descent* after the passing of the Act will not come within such proviso, and consequently he will not be entitled to exoneration, although the mortgage deed by which the equity of redemption was reserved to his ancestor and his heirs was executed (*Piper* v. *Piper*, 1 J. & H. 91); or the will by which the personalty is bequeathed was made (*Power* v. *Power*, 8 Ir. Ch. Rep. 340) before the 1st of January, 1855.

An heir-at-law, or customary heir of a testator, taking by descent an estate which has been the subject of a lapsed devise, in a will made before the 1st day of January, 1855, will not come within the proviso exempting from the operation of the Act (17 & 18 Vict. c. 113) persons "*claiming under or by virtue of any will* made before the 1st day of January, 1855." See *Nelson* v. *Page*, 7 L. R. Eq. 25.

Where a devisee takes the

mortgaged estate under a will made before the 1st of January, 1855, he will come within the meaning of the proviso, and be entitled to exoneration, although the devisor may have executed another will after that date which, without affecting the devise, operated as a republication of the will: *Rolfe* v. *Perry*, 3 De G. J. & S. 481; 11 W. R. (L. C.) 674; 9 Jur. N. S. 853.

With reference to the question, what will be considered "a contrary or other intention" within the meaning of the Act, judges, as might be expected, have differed, and it has been observed by Lord *Westbury*, C., that "it is impossible to lay down a general rule as to what is a sufficient signification by a testator of an intention to exclude the operation of the Act; and that in each case the intention must be gathered from the whole instrument:" *Rolfe* v. *Perry*, 3 De G. J. & S. 481; 11 W. R. (L. C.) 674, 675; 9 Jur. N. S. 853.

Upon the construction of this part of the Act, there is a dictum of Lord *Campbell*, C., in *Woolstencroft* v. *Woolstencroft* (2 De G. F. & J. 347) (afterwards adopted by the legislature—see 30 & 31 Vict. c. 69, post p. 719) to the effect that the rule which had before been observed with respect to exempting personal estate, should now be observed with respect to exempting the mortgaged land from the payment of the mortgaged money. With reference, however, to this dictum, Lord Justice *Turner* said that, "it probably meant no more than that the intention must be clearly proved. If Lord *Campbell* intended to say, that as before the Act it had been necessary to show an intention, not only to charge the mortgaged estate, but also to discharge the personalty, so now it was necessary to show an intention, not only that another fund should be charged, but also that the mortgaged estate should be discharged, he was not prepared to follow him. In order to take a case out of the Act, it was sufficient to show a contrary intention: this destroyed the analogy between the two cases. In the one case, the intention to be proved was contrary to a settled rule of law; in the other, it was only contrary to a statutory rule, expressly made dependent upon intention." *Eno* v. *Tatham*, 11 W. R. (L. J.) 475; *S. C.*, 4 Giff. 181: and see *Mellish* v. *Vallins*, 2 J. & H. 194.

It has been decided that a mere direction by the testator that the debts "shall be paid as soon as may be" (*Pembrooke* v. *Friend*, 1 J. & H. 132), even although the real estate in mortgage be devised in strict settlement (*Coote* v. *Lowndes*, 10 L. R. Eq. 376); or that debts should be paid "out of his estate" (*Brownson* v. *Lawrance*, 6 L. R. Eq. 1); or by his "executors out of his estate" (*Woolstencroft* v. *Woolstencroft*, 2 De G. F. & Jo. 347, reversing the decision of Sir

J. Stuart, V.-C., 2 Giff. 192), the source from which the payment is to be made not being mentioned, will not show a contrary or other intention sufficient to exonerate the mortgaged estate from its primary liability.

Where, however, the *personal estate* was bequeathed upon trust to pay (*Moore* v. *Moore*, 1 De G. Jo. & Sm. 602, reversing the decision of Sir *J. Romilly*, M. R., 10 W. R. 877), or subject to the payment of (*Eno* v. *Tatham*, 11 W. R. (L. J.) 475; *S. C.*, 4 Giff. 181; *Mellish* v. *Vallins*, 2 J. & H. 194) debts, these words have been held sufficient to show a contrary intention within the meaning of the Act so as to charge the personalty primarily with the payment of the mortgage debts on estates devised by the will. See, also, *Smith* v. *Smith*, 3 Giff. 263; *Smith* v. *Smith*, 10 Ir. Ch. Rep. 89, and on appeal, *Ib.* 461; and *Maxwell* v. *Maxwell*, 4 L. R. Ho. Lo. 506, affirming S. C. nom., *Maxwell* v. *Hyslop*, 4 L. R. Eq. 407, where it was held that a Scotch heritable bond, given by a domiciled Englishman, was payable in exoneration of the estate upon which the bond was charged out of his residuary personal estate, bequeathed for payment of his "just debts." Sed vide contra, *Rowson* v. *Harrison*, 31 Beav. 207.

But a testator may without inconsistency show an intention that a mortgaged estate shall be exonerated out of the personal estate, without signifying any intention that it shall be exonerated out of the other real estate; and in such case the personal estate only is applicable in payment of the mortgages: *Rodhouse* v. *Mold*, 13 W. R. (V. C. K.) 854; 35 L. J. Ch. 67.

Where the testator has provided other sources for the payment of the mortgages, as for instance his residuary real or personal estate, the general provisions of the Act do not apply: *Allen* v. *Allen*, 30 Beav. 395, 402; *Greated* v. *Greated*, 26 Beav. 621. And see the remarks thereon, 30 Beav. 401; *Newman* v. *Wilson*, 31 Beav. 33; *Stone* v. *Parker*, 1 Drew. & Sm. 212. See also and consider *Rawson* v. *M'Causland*, 7 I. R. Eq. 277; 8 I. R. Eq. 617.

In order to remove doubts arising upon the construction of 17 & 18 Vict. c. 113, the legislature passed the 30 & 31 Vict. c. 69, which enacts, that "in the construction of the will of any person who may die after the 31st day of December, 1867, a general direction that the debts, or that all the debts of the testator, shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act (17 & 18 Vict. c. 113), unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged

by way of mortgage on any part of his real estate. (Sect. 1.) That in the construction of the said Act and of this Act, the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a *testator*." (Sect. 2.)

As sec. 2 of this Act applies only to lands or hereditaments purchased by a "testator," the heir-at-law of an *intestate* has been held to be entitled to have the lien for unpaid purchase-money, upon an estate purchased by the intestate, paid for out of his personal estate: *Harding* v. *Harding*, 13 L. R. Eq. 493. See ante, pp. 361, 362.

But, by the Bill of the Lord Chancellor now before Parliament, the operation of the Act in the case of a vendor's lien, is to be extended to the heir-at-law of an intestate.

If a testator wishes to give a direction which shall be deemed under 30 & 31 Vict. c. 61, a declaration of an intention contrary to the rule laid down in Mr. Locke King's Act, it must be a direction applying to his mortgage debts in such terms as unmistakably refer to or describe them. See *Nelson* v. *Page*, 7 L. R. Eq. 25. There J. Nelson, by will dated the 13th of August, 1835, after directing that all his just debts, funeral and testamentary expenses, should be paid by his executors thereinafter named, as soon as conveniently might be after his decease, and having made several devises and bequests, finally devised and bequeathed "to his mother, Ann Nelson, her heirs, executors, administrators, and assigns, all the rest, residue, and remainder of his estate and effects for her and their own use and benefit. Mrs. Nelson and the executors named in the will, all died in the testator's lifetime. In 1842 the testator purchased a freehold and copyhold estate in Essex, which, in 1848, he mortgaged for 2500*l.* and interest. On the 23rd of July, 1868, he died. The plaintiff, who was the testator's heir-at-law and customary heir, filed a bill against the administratrix praying for a declaration that he was entitled to have the mortgage debt paid out of the personal estate. It was held by Sir *G. M. Giffard*, V.-C., that he was not so entitled, either under 17 & 18 Vict. c. 113, or 30 & 31 Vict. c. 69. "There can be no doubt," said his Honor, "that under the old law, supposing that neither of these Acts had been passed, this heir would clearly have been entitled to exoneration. Then came Mr. Locke King's Act; and the facts to which we have to apply the provisions of that statute are, that the will was made before the 1st of January, 1855; but the person who claims this property as heir claims it as the heir of a person who did not die till after 1867. Now Mr. Locke King's Act provides in substance as

follows:—That when any person shall, after 1854, die seised of land charged with a mortgage debt, and such person shall not by his will have signified any contrary or other intention, the heir or devisee to whom such land shall descend or be devised shall not be entitled to have the mortgage debt discharged out of the personal estate. There, if we stop without going to the following proviso, it is plain that heirs and devisees are both within the Act. But then comes the proviso that nothing therein contained shall affect the rights of any person 'claiming under or by virtue of any will' made before the 1st of January, 1855. Now it is plain that this proviso extends to the case of *a devisee only*. It is plain that the only person intended to be excepted by this proviso out of the Act, is a devisee under a will made prior to 1855. It follows, therefore, that this heir comes within the operation of the statute, although the devisee, had she lived, would not have done so.

"Then comes the question, whether in these two Acts, taken together, there is to be found anything which will take away the effect of the declaration to be found at the commencement of this will, that all the testator's just debts are to be paid by his executors out of his personal estate. We all know the direction which was given to the current of the decisions on this subject. There were, at length, so many of them that they came to be established as law, and in the end gave rise to the passing of the statute of 1867. I think the language of that statute is reasonably plain, though it is not, perhaps, so happily expressed as it might be.

"The Act of 1867 says, that in the construction of the will of any person who may die after 1867, a general direction that the debts shall be paid out of the personal estate shall not be deemed to be a declaration of an intention contrary to the rule established by Mr. Locke King's Act, unless such contrary or other intention be further declared by words expressly, or by implication, referring to all or some of the testator's mortgaged debts. The meaning of that appears to be this—that if a testator wishes to give a direction which shall be deemed a declaration of an intention contrary to the rule laid down by Mr. Locke King's Act, it must be a direction applying to his mortgaged debts, in such terms as distinctly and unmistakably to refer to or describe them. I cannot say that there is in this will a direction of that kind, and I cannot, therefore hold that the estate in the hands of the heir is exonerated from the payment of the mortgaged debt." See, also, *Lewis* v. *Lewis*, 13 L. R. Eq. 219, 227.

In *Sackville* v. *Smyth*, 17 L. R.

Eq. 153, a testator who was entitled to an estate subject to a mortgage, devised part thereof, viz., the mansion house for the benefit of his widow for her life, and the remainder to others, and he bequeathed his residuary personal estate subject to the payment of his debts and funeral and testamentary expenses to A., and directed that in case his residuary personal estate should be insufficient to pay the same, the trustees were to borrow any sum of money which might be required to make up such deficiency on the security of his real estate, except his mansion, by way of mortgage. It was held by Sir *G. Jessel*, M. R., that no contrary or other intention was shown within the meaning of Locke King's Acts so as to exonerate the widow's life interest from keeping down a proportionate part of the interest on the mortgage.

In what order assets are applicable in the exoneration of mortgaged Estates.]—Where a *devisee* is entitled to have the estate exonerated from the mortgage debt by the assets of the testator, they will be applicable in the following order:—1st. The general personal estate: *Philips* v. *Philips*, 2 Bro. C. C. 273. 2nd. Lands expressly devised for payment of debts: *Serle* v. *St. Eloy*, 2 P. Wms. 386; *Philips* v. *Parry*, 22 Beav. 279. And a proviso inserted in a mortgage of a lunatic's estate (with respect to which he afterwards died intestate), making such estate as between his heirs and devisees primarily liable to the mortgage debt previous to his lunacy secured by the deposit of the title deeds only, has been held not to be intended to shift the primary liability from other real estates which the lunatic had, when sane, devised upon trusts for payment of his debts. See *Freeman* v. *Ellis*, 1 Hem. & Mill. 758, there a testator devised his personalty and an estate, K., and other real estates, upon trusts for payment of debts, and subject thereto to certain devisees, and afterwards purchased the H. estate, as to which he died intestate. The testator deposited the deeds of the H. estate to secure 1000*l.*, and was subsequently found lunatic. Under an order in lunacy a mortgage was made of the H. and K. estates, to raise a sum of money to pay off the 1000*l.*, and the other debts of the lunatic; and a proviso was inserted, that as between the lunatic, his heirs and devisees, the H. estate should be considered as the primary security for the mortgage debt. The lunatic having died, it was held by Sir *W. Page Wood*, V.-C., that, on the true construction of the proviso, it did not have the effect of exonerating the devised estates at the expense of the H. estate, and the devised estates were ordered to be first applied in payment of

the mortgage debt. 3rd. Lands descended to the heirs: *Galton* v. *Hancock*, 2 Atk. 424, 427, 430; *Lomax* v. *Lomax*, 12 Beav. 285. And 4th. Lands devised charged with debts: *Davies* v. *Topp*, 2 Bro. C. C. 259: and in this last case all the devisees (including the devisee of the mortgaged estate, *if so charged*) must contribute pro ratâ towards payment of the mortgage debt: *Carter* v. *Barnadiston*, 1 P. Wms. 505; *Middleton* v. *Middleton*, 15 Beav. 450. Secus, if other devised estates are not charged with debts; *Galton* v. *Hancock*, 2 Atk. 482; *Emuss* v. *Smith*, 2 De G. & Sm. 722. Nor is the devisee entitled to have his estate exonerated out of estates comprised in a residuary devise, which is now held, notwithstanding 1 Vict. c. 26, s. 24, to be specific. See *Eddels* v. *Johnson*, 1 Giff. 22; *Pearmain* v. *Twiss*, 2 Giff. 130; *Emuss* v. *Smith*, 2 De G. & Sm. 722; *Clark* v. *Clark*, 34 L. J. N. C. (Ch.) 477; overruling *Dady* v. *Hartridge*, 1 Dr. & Sm. 236; *Barnwell* v. *Iremonger*, Ib. 242; *Rotheram* v. *Rotheram*, 26 Beav. 465; *Rodhouse* v. *Mold*, 35 L. J. Ch. 67. And see *Hensman* v. *Fryer*, 3 L. R. Ch. App. 420, where Lord *Chelmsford*, reversing the decision of Sir *R. Kindersley*, V.-C., decided that a residuary devise was specific, but by mistake made the specific devisees contribute rateably to pay debts with pecuniary legatees. See *Collins* v. *Lewis*, 8 L. R. Eq. 708. And where a property is subject to a mortgage and part is devised to specific and part to residuary devisees, each part of the estate must contribute rateably: *Gibbins* v. *Eyden*, 7 L. R. Eq. 391. In the case, however, of *Brownson* v. *Lawrance*, 6 L. R. Eq. 1, Lord *Romilly*, M. R., was of opinion that the fact of a testator having specifically devised part of the mortgaged estate, and left the other part to pass by a general residuary devise, was of itself an expression of his intention, that the part which passed by the general residuary devise should be primarily liable to the payment of the whole of the mortgage debt in exoneration of the part which was specifically devised, and that therefore Locke King's Act did not apply. This decision, however, appears to be contrary to the current of authority, and had been distinctly disapproved of by Sir *G. Jessel*, M. R., in the recent case of *Sackville* v. *Smyth*, 17 L. R. Eq. 153, 155.

Where a testator possessed of various leasehold estates, some of which were mortgaged, and others not, specifically bequeathed the latter to the plaintiff, and the former to other parties; and, after making other specific and pecuniary bequests, gave the residue of his personal estate to his wife, and directed his trustees and executors to receive the rents of all his property, and to apply the same in payment of his debts,

together with the principal money and interest owing upon the mortgage of his property, and of the legacies and annuities given by his will, until the whole should be fully paid: it was held by Lord *Cranworth*, C., that the bequest of the incumbered leaseholds was not a bequest of the equity of redemption only; that the relative values of all the leaseholds should be ascertained; and that the plaintiff was not entitled to be let into possession before she had contributed her rateable proportion in discharge of all the debts and legacies: *Harper* v. *Munday*, 7 De G. Mac. & G. 369.

A devisee is not entitled to have the estate exonerated out of the personalty, as against specific legatees (*O'Neal* v. *Mead*, 1 P. Wms. 693; *Emuss* v. *Smith*, 2 De G. & Sm. 737, 738);—nor as against pecuniary legatees (*Lutkins* v. *Leigh*, Ca. t. Talb. 53; *Johnson* v. *Child*, 4 Hare, 87);—nor as against a widow's paraphernalia (1 P. Wms. 730;—nor, à fortiori, as against creditors. See *Hamilton* v. *Worley*, 2 Ves. jun., 65, where Lord *Loughborough* observes, "The equity the Court affords to a person entitled to real estate by devise, to have the incumbrances upon it discharged as a debt out of the personal estate, can go no farther than this:—as between the heir or devisee of the estate and residuary legatee, it cannot interfere with the disposition of other parts, as specific or general legacies, much less with the interests of creditors."

The *heir*, where an estate descends subject to a mortgage, is entitled to exoneration, in cases not within the Act 17 & 18 Vict. c. 113, as amended by 30 & 31 Vict. c. 69, first, out of the general personal estate; and, lastly, out of real estates expressly devised for payment of debts: *Hill* v. *Bishop of London*, 1 Atk. 621.

Where freeholds and leaseholds have been mortgaged together, they must, if not exonerated, as between the heir and administrator of the mortgagor, bear the burthen rateably (*Evans* v. *Wyatt*, 31 Beav. 217; and see *Heveningham* v. *Heveningham*, 2 Vern. 355. In *Lipscomb* v. *Lipscomb*, 7 L. R. Eq. 501, real estate was mortgaged to secure 1500*l.*, and by a subsequent deed the same realty, together with other realty, was mortgaged to secure the same debt and an additional debt; and a policy of assurance and other personalty were assigned as a further security. The mortgagor having died intestate, it was held by Sir *R. Malins*, V.-C., that as between the administrator and the heir-at-law the estate originally mortgaged was primarily liable to the payment of the 1500*l.*; and that the additional debt must be rateably apportioned as between the realty and personalty comprised in the second deed. See also *De Rochefort* v. *Dawes*, 40 L. J. N. S. (Ch.) 625.

Where an estate is only charged in aid of another, the latter will be primarily liable: *Stringer* v. *Harper*, 26 Beav. 33; *Lipscomb* v. *Lipscomb*, 7 L. R. Eq. 501.

The election of the mortgagee to come upon the personalty for payment of the mortgage debt will not determine what fund shall be ultimately charged with it; for, under the ordinary rule of marshalling the simple contract creditors, the widow or legatees would have a right to stand in his place for so much of the real estate as he should take out of the personal. They will not, therefore, be prejudiced, nor will the devisee be benefited by the election of the mortgagee to proceed, as he undoubtedly may, against the personal estate in the first instance.

It must, however, be remembered that, under Hinde Palmer's Act (32 & 33 Vict. c. 46), a mortgagee, being (as he ordinarily is by reason of the covenant in the mortgage deed) a specialty creditor, is only entitled to be paid pari passu with simple contract creditors.

Moreover, under the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10, in the administration of the assets of any person who may die after the 1st of November, 1875, and whose estate may prove insufficient for the payment in full of his debts and liabilities, and in the winding-up of Companies a mortgagee, if he proves for his whole debt, must give up his security, or, if his security be realised or valued, he can prove only for the balance. See Trower's Prevalence of Equity, p. 4.

As to marshalling securities, see *Aldrich* v. *Cooper*, 2 L. C. Eq. and note.

RUSSEL *v.* RUSSEL (*a*).

Easter Term, 1783.

Reg. Lib. 1782, A., fol. 441.

[REPORTED 1 BRO. C. C. 269.]

EQUITABLE MORTGAGE BY DEPOSIT OF TITLE-DEEDS.]—*Pledge of a lease carried into effect, against assignees of a bankrupt. Evidence of the bankrupt, he having had his allowance, and certificate allowed to be read.*

(*a*) *Hales* v. *Van Berchem*, 2 Vern. 617, where it was held that the deposit in that case for the performance of a written agreement, though there was no writing declaring it to be a security, was not within the statute.

A LEASE having been pledged by a person (who afterwards became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee brought this bill for a sale of the leasehold estate.

Mr. *Lloyd*, for the plaintiff, merely stated the case, and that the plaintiff had a lien upon the estate.

Mr. *Kenyon*, for the defendants, the assignees, insisted that the plaintiff's claim was against the law of the land; for that it would be charging land without writing, which is against the fourth clause of the Statute of Frauds (*b*).

(*b*) 29 Car. 2, c. 3, s. 4.

Lord LOUGHBOROUGH, Lord Commissioner.—In this case it is a delivery of the title to the plaintiff for a valuable consideration. The Court has nothing to do but to supply the legal formalities. In all these cases the contract is not *to be* performed, but *is* executed.

ASHURST, Lord Commissioner.—Where the contract is for a sale, and it is admitted so to be, it is an equivocal act to be explained, whether the party was admitted as tenant or as purchaser. So here it is open to explanation, upon what terms the lease was delivered.

A question arose as to reading the bankrupt's evidence,

he having had his allowance and certificate, but the Court suffered it to be read, thinking him not bound to refund.

An issue was directed to try whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt.

Upon the trial, the jury found it was deposited as a security (*a*).

(*a*) The Reporter has been informed that this cause came on afterwards (though he has not been able to ascertain the date) before Lord *Thurlow*, on the equity reserved when his Lordship ordered that the lease should be sold, and the plaintiff paid his money.

The same point has been since determined in the cases of *Featherstone* v. *Fenwick*, May, 1784, and *Harford* v. *Carpenter*, 17th and 18th of April, 1785, where Lord *Thurlow* held, that the deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated. Although there was no special agreement to assign, the deposit affords a presumption that such was the intent.

By the 4th section of 29 Car. 2, c. 3, commonly called the Statute of Frauds and Perjuries, it is enacted, "that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Notwithstanding this statute, it was held first by the Lords Commissioners, and afterwards by Lord *Thurlow*, in the case of *Russel* v. *Russel*, that a mere deposit of title-deeds by a debtor for the purpose of securing a sum of money, gave his creditor, in whose hands they were placed, an *interest in the land* to which they related, so as to enable him to file a bill for a sale.

"I remember," says Lord *Eldon*, "previously to *Russel* v. *Russel*, it was very much doubted, whether a mere deposit of deeds constituted an equitable mortgage, if there was no writing to manifest the purpose; since, resting altogether upon parol, it is quite competent to the man who put the deeds into the hands of a creditor, without reference to the debt, afterwards, from favour to that creditor, to say they were deposited with him for the purpose of securing his debt; and so all the perjury that the statute meant to avoid is introduced, and the rule changed. But Lord *Thurlow* was of opinion, and that is not now to be disturbed, that *the fact of the adverse possession of the deeds in the person claiming the lien, and out of the other, was a fact that entitled the Court to give an interest*:" *Ex parte Coming*, 9 Ves. 115. On many other occasions, *Russel* v. *Russel* has been strongly commented on, and disapproved of by Lord *Eldon*, as in effect repealing part of the Statute of Frauds. It has, however, been constantly acted upon and recognised as a

binding authority. See *Ex parte Wetherell*, 11 Ves. 398; *Ex parte Haigh*, 11 Ves. 403; *Ex parte Mountford*, 14 Ves. 606; *Ex parte Kensington*, 2 V. & B. 79; *Ex parte Hooper*, 1 Mer. 9; *Lacon* v. *Allen*, 3 Drew. 579, 582; *The National Bank of Australasia* v. *Cherry*, 3 L. R. P. C. C. 299.

A deposit of a copy of court rolls (*Ex parte Warner, re Cooke*, 1 Rose, 286; *Winter* v. *Lord Anson*, 3 Russ. 493; *Whitbread* v. *Jordan*, 1 Y. & C. Exch. Ca. 303; *Tylee* v. *Webb*, 6 Beav. 552; *Pryce* v. *Bury*, 2 Drew. 11), or of an agreement for a lease (*The Unity Joint-Stock Mutual Banking Association* v. *King*, 25 Beav. 72), or of a policy of insurance (*Ferris* v. *Mullins*, 2 Sm. & G. 378), or of a registered mortgage of a ship: (*Lacon* v. *Liffen*, 4 Giff. 75; 9 Jur. N. S. 13,) will create an equitable mortgage. So likewise will a deposit of certificates of shares in a public company under the Joint Stock Companies Act (1862): *Ex parte Moss*, 3 De G. & Sm. 599; *Ex parte Stewart, Re Shelley*, 34 L. J. Bkcy. 6; 13 W. R. (L.C.) 356. Sed vide *Ex parte Boulton, re Sketchley*, 1 De G. & Jo. 163.

Notice, however, to the company of the deposit was necessary previous to the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 15), to take such property out of the order and disposition of the depositor, should he become bankrupt or insolvent: *Ex parte Boulton, re Sketchley*, 3 Jur. N. S. Ch., 425. But a deposit of a land order of the new Zealand Company, by way of mortgage, was held to be good, without notice having been given to the company of the deposit: *Ex parte Barnett*, 1 De G. 194.

A public company, under the Joint Stock Companies Act, 1862, can make a mortgage by deposit (*In re General Provident Assurance Company, ex parte National Bank*, 19 L. R. Eq. 507), but not to any of its own officers, such as a manager or director, or to their solicitor, even if he be only solicitor *in hâc re* (*In re Patent Bread Machinery Co., ex parte Valpy and Chaplin*, 7 L. R. Ch. App. 289), by a mere deposit of deeds, or otherwise, than in the manner prescribed by the Companies Act, 1862, s. 43, so as to be binding against the general creditors of the company, because it is the duty of an officer of the company to see that all mortgages were made in compliance with the directions of the Legislature, and duly registered: *In re General Provident Assurance Company*, 14 L. R. Eq. 513, cited; *In re Wynn Hall Coal Company*, 10 L. R. Eq. 515.

A company, however, can effect a valid mortgage by deposit of deeds with bankers without complying with the formalities required by the Legislature upon the execution of mortgage deeds, because a banker is not an officer of a company, and therefore it is not

his duty to see that such formalities were complied with: *In re General Provident Assurance Company, Ex parte National Bank*, 14 L. R. Eq. 507. See also *In re Joseph Williams*, 3 1. Rep. Eq. 346; *In re Patent File Company*, 6 L. R. Ch. App. 83; *In re Imperial Land Company of Marseilles*: *In re National Bank*, 10 L. R. Eq. 298.

Sir *R. Malins*, V.-C., has strongly disapproved of the Courts having gone so far in allowing of mortgages by deposit by Companies, observing that he thought that it would have been very well indeed if the Courts had resolved never to give any effect to any mortgage by Companies by deposit of title deeds or otherwise, unless the requisites of the Articles of Association had been first complied with, because it is a great safeguard to shareholders that these ceremonies should be gone through. It would be a great restraint on careless or fraudulent directors and officers of the company that they could not create a mortgage upon the property of the company without going through all the ceremonies as those which were prescribed: *In re General Provident Assurance Company, ex parte National Bank*, 14 L. R. Eq. 513. Sed vide *In re Patent File Company*, 6 L. R. Ch. App. 83, 87, 88.

Although the law of Scotland knows nothing of equitable mortgages, the owner of a Scotch estate can be compelled in England to give effect to a pledge made by the deposit of title-deeds: *Ex parte Pollard*, Mont. & C. 239; 4 Deac. 27; *Coote* v. *Jecks*, 13 L. R. Eq. 597; Westl. Priv. International Law, 58.

And a deposit of a minute of a lease of lands and a pledge of chattels in Scotland does not require registration, under the Bills of Sales Act, 17 & 18 Vict. c. 36; *Coote* v. *Jecks*, 13 L. R. Eq. 601.

A deposit of the title deeds of a house in Shanghai has been held good, although no memorandum of the deposit was made at the British Consulate at Shanghai, and the house remained registered in the name of the depositors. *Ex parte Holthausen*, 9 L. R. Ch. App. 722.

If there are no title deeds or conveyances in the depositors' possession, an equitable mortgage may be created by the deposit of the receipt for purchase money, containing the terms of the agreement for sale: *Goodwin* v. *Waghorn*, 4 L. J. N. S. Ch. 172; but the deposit of an attested copy of a deed will not it seems be sufficient for that purpose: *Ex parte Broadbent*, 1 M. & A. 635; 4 D. & C. 3.

Where land has been registered under the Land Registry Act (25 & 26 Vict. c. 53) no equitable mortgage could be created by a deposit of the title deeds (sec. 63), but it might be created by a deposit of the land certificate (sec. 73).

Under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), which has in effect repealed the Land Registry Act, subject to any registered estates, charges, or rights, the deposit of the land certificate in the case of freehold land, and of the office copy of the registered lease in the case of leasehold land, shall, for the purpose of creating a lien on the land to which such certificate or lease relates, be deemed equivalent to a deposit of the title deeds of the land (sect. 81).

Where the title of land has been registered under the Act to facilitate the Title to and Conveyance of Real Estates (25 & 26 Vict. c. 53), an equitable mortgage thereof cannot be created by a deposit of title deeds (sec. 63); but a deposit of the land certificate will have the same effect for the purpose of creating a lien upon the estate and interest of the depositor, as a deposit of the title deeds of the estate would have had before the passing of the Act (sec. 73).

Previous to the decision of *Russel* v. *Russel*, many cases occurred in which persons having title-deeds in their hands had a right to say they had an interest in the deeds, but not in the estate, except collaterally; if, for instance, the owner could not part with the estate without the deeds, he should not have them without paying the debt, the possession of the deeds giving no direct interest in the estate, but an interest arising out of the power of embarrassing the proprietor in the sale: *Ex parte Whitbread*, 19 Ves. 210; *Ex parte Kensington*, 2 V. & B. 83.

The effect of a mere deposit of title-deeds to secure a sum of money has been thus stated by Sir *R. T. Kindersley*, V.-C.: "By the deposit the mortgagor contracts that his interest shall be liable to the debt, and that he will make such conveyance or assurance as may be necessary to vest his interest in the mortgagee." *Pryce* v. *Bury*, 2 Drew. 42.

But the terms of an agreement upon the deposit of the deeds, may show the intention of the parties to have been different. Thus, in *Sporle* v. *Whayman* (20 Beav. 607), title deeds were deposited by the defendant with the plaintiff as an indemnity against contingent payments to which he might become liable as security upon a joint and several promissory note, but there was *no agreement to execute a formal mortgage*. Before the plaintiff had made any payment, he filed a bill to have a formal mortgage executed. It was held, however, by Sir *J. Romilly*, M. R., that he was not entitled thereto, but only to a memorandum, signed by the defendant, specifying the terms of the deposit. "The plaintiff," said his Honor, "wants to preserve evidence of the terms of the deposit; I think he is entitled to have it in writing, in order to make it effectual, if ever he should be called upon to pay the promissory

note. His right is clear; for suppose after the lapse of four or five years, the plaintiff should be called on to pay any part of the debt, if the defendant were dead, the terms of the agreement might then be contested. This Court daily sees the great inconvenience which arises from depositing deeds without clear written evidence of what they are to secure. Thinking that the plaintiff is entitled to have evidence in writing, I have then specifically to perform the agreement; and I am of opinion that the plaintiff is entitled to receive a memorandum, signed by the defendant, specifying the terms on which the title-deeds were deposited. I shall direct him to sign such memorandum, and the terms of it must be settled in chambers if the parties disagree."

So where a person deposits deeds upon a condition: as for instance, that a sum of money shall be advanced for seven days to another party, if the persons with whom the deeds are deposited do not fulfil the condition by advancing the money for seven days, they will have no lien upon the deeds: *Burton* v. *Gray*, 8 L. R. Ch. App. 932.

How equitable mortgages may be created.]—In order to create a valid equitable mortgage there must be either express evidence of the intention to do so, which may, as in the principal case, be by parol (*Ex parte Haigh*, 11 Ves. 403; *Ex parte Mountfort*, 14 Ves. 606; *Ex parte Kensington*, 2 V. & B. 83), or, as is often the case, by a memorandum in writing, or partly by writing and partly by parol (*Casberd* v. *The Attorney-General*, 6 Price, 411; *Ede* v. *Knowles*, 2 Y. & C. C. C. 172; *Burgess* v. *Moxon*, 2 Jur. N. S. 1069); or a presumption may arise of such intention from the mere deposit of the deeds, where their possession by the depositee cannot otherwise be accounted for: *Featherstone* v. *Fenwick*, 1 Bro. C. C. 270 n.; *Harford* v. *Carpenter*, *Ib.*; *Edge* v. *Worthington*, 1 Cox, 211; *Ex parte Langston*, 17 Ves. 227; *Dixon* v. *Muckleston*, 8 L. R. Ch. App. 155.

The mere possession of deeds without evidence of the contract upon which the possession originated, or at least of the manner in which that possession originated, so that a contract may be inferred, will not be enough to create an equitable security: see *Chapman* v. *Chapman*, 13 Beav. 308. There a bill filed in 1846 alleged a loan by the plaintiff to the testator in the year 1827, upon his bond and a deposit of the title-deeds of a freehold estate. The testator died in 1831, and interest on the debt had been regularly paid by his executors until October, 1843. No evidence was given of the circumstances under which the deeds had come into the possession of the plaintiff, and there was no admission of an equitable

deposit by the persons entitled to the estate. It was held by Lord *Langdale*, M. R., that what had taken place neither constituted a valid equitable mortgage, nor a sufficient ground for an inquiry before the Master. "The only evidence," said his Lordship, "is this:—the title-deeds are produced from the present possession of a party who is also a bond creditor, and nothing whatever is proved connecting the bond with the possession of the title deeds. The simple statement of the case, therefore, is, that at this time, being a great many years after the alleged transaction, the title-deeds are discovered to be in, and are produced from, the possession of the bond creditor. I am of opinion that this is not sufficient to support an equitable mortgage." See also *Ex parte Jones*, 3 M. & A. 152; *Williams* v. *Medlicot*, 6 Price, 495; *Dixon* v. *Muckleston*, 8 L. R. Ch. App. 155, 162. Sed vide *Smith* v. *Constant*, 4 De G. & Sm. 213, 216.

A fortiori there will no equitable mortgage be created if the circumstances under which deeds are left with a party are such as raise an inference that a deposit was not intended, as, for instance, where title-deeds were left in the counting-house of a banker, after he had refused to advance money on them, it was held that no valid equitable mortgage was created: *Lucas* v. *Dorrein*, 7 Taunt. 278: 1 J. B. Moore, 29. In *Wardle* v. *Oakley*, 36 Beav. 27, Oakley, by deed, mortgaged freeholds to Phillips, and at the same time the title-deeds, not only of the freeholds, but of leaseholds belonging to Oakley, were delivered to Phillips. Afterwards a further charge, by way of indorsement, was executed on the first deed, and this deed did not include the leaseholds. It was held by Lord *Romilly*, M. R., in the absence of proof, to the contrary, that Phillips had no lien on the leaseholds for the money advanced. "If," said his Lordship, "the leaseholds were intended to be included in the mortgage security, why were they omitted from the deeds? and why, if meant to be an additional security by way of deposit, was no memorandum made of it? and why is there a total blank of any evidence of such an intention on either side? If I accidentally deliver a box of deeds to a creditor of mine, that would not constitute him an equitable mortgagee. It might well be that the delivery of the deeds would be primâ facie evidence of such intention, which would throw the burthen of proving the negative on the owner; but if that is so, I think that in the present case this burthen is fully discharged by the production and examination of the contents, purport, and effect of the two mortgage deeds executed by Mr. Oakley to the testator (Phillips), which show the extent of the contract

between the parties, what one intended to include in the mortgage, and what the other accepted as a sufficient security. I am of opinion that the deeds in question were sent by mistake with the deeds relating to the freeholds to Mr. Phillips, and that he neither contracted for, nor intended to contract for, any additional security on the leaseholds by way of equitable mortgage, and that the possession of the deeds, in such circumstances, confers no lien."

No presumption of an intention to create an equitable mortgage can be raised by a mere deposit of deeds in contravention of a written document by which it is accompanied: *Shaw* v. *Foster*, 5 L. R. Ho. Lo. 340, 341. And it has been long since established that where there is a statement or memorandum in writing of the circumstances under which the deposit was made, parol evidence is not admissible to contradict it (*Ex parte Coombe*, 17 Ves. 369; and see *Baynard* v. *Woolley*, 20 Beav. 583); but it is admissible to extend a lien evidenced by a memorandum in writing. See *Ex parte Kensington*, 2 V. & B. 79, and *Ex parte Nettleship*, 2 M. D. & De G. 124, where Sir *John Cross* held, that an agreement in writing, accompanying the deposit of title-deeds, to secure a specific sum, might be extended as a security beyond that sum by a subsequent verbal agreement.

An agreement accompanied with a deposit of title-deeds, for making a mortgage, or for pledging the same as a security, requires an ad valorem stamp (33 & 34 Vict. c. 97, s. 105); secus a memorandum simply stating the purpose of the deposit: *Meek* v. *Bayliss*, 31 L. J. Ch. 448. But where the agreement, in consequence of being unstamped, is inadmissible as evidence, other parol evidence may be given, in order to establish the equitable mortgage: *Hiern* v. *Mill*, 13 Ves. 114.

Formerly, the memorandum of deposit of deeds to secure an annuity required enrolment, under 53 Geo. 3, c. 141, and 3 Geo. 4, c. 92 (*Ex parte Miller*, 3 De G. & Sm. 553); but those Acts, which were passed in order to prevent evasion of the usury laws, were, upon the abolition of those laws, repealed (17 & 18 Vict. c. 90), so that enrolment in such cases is not now necessary; but by a subsequent Act (18 & 19 Vict. c. 15, s. 12) registration in the Common Pleas, as against purchasers, mortgagees, and creditors, is requisite.

A presumption arises of an intention to create an equitable mortgage, by the deposit of title-deeds, for the purpose of preparing a legal mortgage (*Edge* v. *Worthington*, 1 Cox, 211; *Hockley* v. *Bantock*, 1 Russ. 141; *Keys* v. *Williams*, 3 Y. & C. Exch. Ca. 62; *James* v. *Rice*, 5 De G. Mac. & G. 461, overruling *Brander* v. *Boles*, Prec. Ch. 375; *Brisick*

v. *Manners*, 9 Mod. 284; *Ex parte Bulteel*, 2 Cox, 243; *Norris* v. *Wilkinson*, 12 Ves. 192; *King* v. *Benson*, 6 Price, 476, cited; *Ex parte Hooper*, 1 Mer. 7; *Ex parte Pearse & Prothero*, 1 Buck, 525); or by a direction to hold them until the settlement of an account or the execution of a mortgage: *Fenwick* v. *Potts*, 8 De G. Mac. & G. 506; *Lloyd* v. *Attwood*, 3 De G. & J. 614.

Where the deeds remain as a deposit in the hands of the debtor, although accompanied by a memorandum, especially if it be not communicated to the creditor, a valid equitable mortgage will not be created thereby. This was decided in *Adams* v. *Claxton*, 6 Ves. 226, 230; going beyond the doubt, rather strongly expressed by Lord *Eldon*, C., in *Ex parte Coming*, 9 Ves. 113.

Where, however, the debtor holds the deposit as the servant of the creditor, it may be good. In *Ferris* v. *Mullins* (2 Sm. & Giff. 378), the secretary of a banking company had a credit account with the bank to the extent of 3000*l.*, secured by a memorandum specifying certain securities deposited by way of equitable mortgage. On his dying indebted to the bank in 4000*l.*, there were found in his office in the banking-house the securities mentioned in the memorandum, with others tied in a bundle and indorsed and labelled as securities, together with other securities kept by him for the bank. It was held by Sir *John Stuart*, V. C., that the bank had a good equitable mortgage on all the securities in the bundle.

A deposit of deeds with a third person for the benefit of the creditor will be valid, provided the intention with which it was made be satisfactorily proved. And the possession of the agent of the debtor will be sufficient if the intention to make him a trustee be shown by the memorandum of deposit: *Lloyd* v. *Attwood*, 3 De G. & Jo. 619.

A deposit of deeds with the wife of the depositor, to be kept by her for the creditor, was held by Lord *Eldon*, C., not to constitute a valid equitable mortgage: *Ex parte Coming*, 9 Ves. 115, where his Lordship observed, "No case has gone the length, though I do not see the reason, that, if the deposit is in the hands of a person who could fairly be called a third person, abstracted from both, that can be considered a deposit for the creditor, provided that is proved to be the intention. But it is very delicate when the deposit remains in the hands of the mortgagor himself; and I doubt much whether a mere memorandum, kept in his own possession, and not parted with to the man in whose favour it is expressed, would take it out of the statute. It is very nearly the same where the deeds are put into the hands of the wife of the mortgagor, to keep them as be-

tween her husband and the creditor."

A valid equitable mortgage may be created by a written memorandum of deposit, although no deposit of deeds may have been actually made with the creditor. As for instance, when the deeds are already in the hands of a third party: see *Daw* v. *Terrell*, 33 Beav. 218. A. B. being entitled to three properties, the title-deeds of one of which were held by his bankers as a security, deposited the title-deeds of the other two with C. D. as a security for a debt, and he gave him an order on the bankers (written by himself, but not signed), to deliver over the deeds of the third property when their lien had been satisfied. It was held by Sir *John Romilly*, M. R., that this gave C. D. a valid equitable mortgage on the property mortgaged to the bankers. See, also, *Ex parte Farley*, 1 M. D. & De G. 683; *Ex parte Heathcoate*, 2 M. D. & De G. 711.

A written agreement also to deposit a deed, as for instance, a lease when granted, has been held upon the granting of the lease to create a valid equitable mortgage. (*Ex parte Orrett, In re Pye*, 3 Mont. & A. 153.) But if no deposit has been actually made, a mere parol agreement to deposit a lease when granted (*Ex parte Coombe, In re Beavan*, 4 Madd. 249), or a mere verbal order to the intended lessor to do so (*Ex parte Perry, In re Collins*, 3 M. D. & De G. 252) will not create a valid equitable mortgage in favour of the persons with whom the deposit is so agreed or ordered to be made. See, also, *Ex parte Hallifax*, 2 M. D. & De G. 544. Moreover a written memorandum of a mere *intention* to make a deposit if it were not communicated to the creditor by the debtor while he could legally do so, or if the deposit were not actually made, though a trust for the payment of the debt might be thereby created, will not create a valid equitable mortgage: *Wilson* v. *Balfour*, 2 Camp. 579; *Re Bankhead's Trust*, 2 K. & J. 560.

It is clear that an equitable mortgage may be created by a deposit of *part of* the title-deeds only (*Ex parte Chippendale*, 1 Deac. 67; *S. C.*, 2 M. & A. 299; *Whitbread* v. *Jordan*, 1 Y. & C. Exch. Ca. 303; *Ex parte Arkwright*, 3 M. D. & De G. 129; *Lacon* v. *Allen*, 3 Drew. 579); and each depositee may have a valid security (*Roberts* v. *Croft*, 24 Beav. 223; 2 De G. & Jo. 6), unless the intention of the parties appears to have been otherwise: *Ex parte Pearse & Prothero*, Buck, 525.

Nor is it necessary that the deeds deposited should show a good title in the depositor, as, for instance, when he deposits all the deeds except the conveyance to himself: *Ex parte Wetherell* 11 Ves. 398; *Roberts* v. *Croft*, 24 Beav. 223; 2 De G. & Jo. 1.

A deposit of deeds, relating to

part of an estate, with a representation that they relate to the whole, will not create an equitable mortgage over the whole of the property, but merely over that part actually comprised in the deeds so deposited (*Jones* v. *Williams*, 24 Beav. 47); but the depositor may, under another head of equity, be compelled to make his representation good: *Roberts* v. *Croft*, 24 Beav. 229.

An equitable mortgage of lands in Middlesex, created by a mere deposit of deeds, does not require registration under the provisions of the Registration Act (7th Anne, c. 20), because there is no instrument to be registered: (*Sumpter* v. *Cooper*, 2 B. & Ad. 223, 226;) but if it be accompanied by a memorandum it will require registration in order to maintain its priority: *Neve* v. *Pennell*, 2 H. & M. 170; *Moore* v. *Culverhouse*, 27 Beav. 639; *In re Wight's Mortgage Deed*, 16 L. R. Eq. 41; *Credland* v. *Potter*, 18 L. R. Eq. 350; 10 L. R. Ch. App. 8.

What property or interest is included in a mortgage by deposit.] —Primâ facie, the deposit of deeds by a debtor constitutes what in familiar language is called an equitable mortgage, upon the whole of the property comprised in them. Per *Knight Bruce*, V.-C., in *Ashton* v. *Dalton*, 2 Coll. 566.

Where, however, the deposit is accompanied by a written memorandum, it may show to what property the security extends, as, for instance, whether certain estates (*Ex parte Glyn*, 1 M. D. & De G. 29), fixtures (*Ex parte Loyd*, 1 M. & A. 494; 3 D. & C. 765), or furniture (*Ex parte Hunt*, 1 M. D. & De G. 139), are to be comprehended therein.

For instance, if deeds deposited by way of equitable mortgage apply to various properties, if it is apparent on the memorandum accompanying the deposit, and from the dealings of the parties, that a portion only of these properties was intended as a security, the lien of the depositee will extend no further than that portion: *Wylde* v. *Radford*, 33 L. J. (N. S.) Ch. 51; 12 W. R. (V. C. K.) 38. See, also, *Ex parte Heathcoate*, 2 M. D. & De G. 711; *Ex parte Robinson*, 1 D. & C. 119; *Ex parte Leathes*, 3 D. & C. 112; *Daw* v. *Terrell*, 33 Beav. 218.

And the equitable mortgage will be confined to the property comprised in the deeds deposited, although the memorandum may refer to deeds relating to other property which are not shown to have been deposited (*Ex parte Powell*, 6 Jur. 490), or the depositor may falsely state that the deeds actually deposited relate to property not comprised therein: *Jones* v. *Williams*, 24 Beav. 47.

According to the well recognised principles of Equity, it is clear that where there has been no consent or subsequent acquiescence on the part of the persons beneficially

interested, who are *sui juris*, an equitable mortgage by deposit of deeds relating to trust property will not prevail against the trust: *Manningford* v. *Toleman*, 1 Coll. 670; but will affect any beneficial interest which the trustees may have therein: *Ex parte Smith, re Hildyard*, 2 M. D. & De G. 587. See also *Ex parte Wright*, 3 M. & A. 49; *Cory* v. *Eyre*, 1 De G. Jo. & Sm. 149; *Stackhouse* v. *Countess of Jersey*, 1 J. & H. 721.

A deposit of title-deeds will comprehend any interest which the depositor may afterwards acquire in the property (*Pryce* v. *Bury*, 16 L. R. Eq. 153, *S. C.*, 2 Drew. 11), and a share taken by partition in lieu of an undivided interest (*Ex parte Farley and others*, 1 M. D. & De G. 683); and where the owner of an estate subject to a mortgage afterwards paid it off, although he took a surrender of the term and kept the deed in his own possession, it was held that the lien created by the incumbrance extended to the whole of the estate freed from the incumbrance. *Ex parte Bisdee*, 1 M. D. & De G. 333.

On a deposit of deeds by way of equitable mortgage, not only fixtures then existing, but also those subsequently erected on the buildings or land comprised in such deeds will form part of the security (*Ex parte Price*, 2 M. D. & De G. 518; *Ex parte Cowell*, 12 Jur. 411; 11 L. J. Bank. 16; *Williams* v. *Evans*, 23 Beav. 239; *Ex parte Astbury*, 4 L. R. Ch. App. 630; *Meux* v. *Jacobs*, 7 L. R. Ho. Lo. 481); and it is immaterial whether such deposit be (*Ex parte Astbury*, 4 L. R. Ch. App. 630; *Ex parte Tagart, In re Mackie*, 1 De G. 531), or be not (*Longbottom* v. *Berry*, 5 L. R. Q. B. 123), accompanied by a memorandum, or if there be one, although no fixtures (*Ex parte Price*, 2 M. D. & De G. 518; *Ex parte Tagart*, 1 De G. 531), or some of the fixtures only (*Ex parte Broadwood*, 1 M. D. & D. G. 631) are therein mentioned. The result will be the same, whether the deposit be made by the owner in fee, who is also the owner of the fixtures (*Ex parte Loyd*, 3 D. & C. 765; *Ex parte Price*, 2 M. D. & De G. 518; *Longbottom* v. *Berry*, 5 L. R. Q. B. 123), or by the lessee, when he is owner of the fixtures; and although as between landlord and tenant they are removable (*Meux* v. *Jacobs*, 7 L. R. Ho. Lo. 481; *Ex parte Astbury*, 4 L. R. Ch. App. 630), for it has been long since decided that the peculiar law allowing the removal of fixtures as between landlord and tenant is entirely inapplicable to the relation of mortgagor and mortgagee: *Fisher* v. *Dixon*, 12 C. & F. 312, 328. See, also, *Ex parte Barclay*, 5 De G. Mac. & G. 403.

And where a lease, the deeds relating to which had been deposited, had expired, and an

agreement had been made for a lease which had not been granted, the produce of the fixtures were held to be still included in the security: *Fearenside* v. *Derham*, 13 L. J. (N. S.) Ch. 354.

Where, moreover, the goodwill of a business carried on upon property included in an equitable mortgage is sold, the equitable mortgagee will be entitled to the proceeds: *Chissum* v. *Dewes*, 5 Russ. 29, and see *Pile* v. *Pile*, 3 Ch. D. 36.

On the bankruptcy of the depositor, fixtures comprised in an equitable mortgage by deposit will not be considered as being in his order and disposition, but will belong to the mortgagee: *Ex parte Barclay*, 5 De G. Mac. & G. 403; *Mather* v. *Fraser*, 2 K. & J. 536; 2 Jur. N. S. 900; *Waterfall* v. *Penistone*, 6 Ell. & Bl. 876; 3 Jur. N. S. 14.

An equitable mortgage by deposit of title-deeds with a memorandum of deposit, which passes fixtures, does not require registration under the Bills of Sale Act (17 & 18 Vict. c. 36) to give it effect as to them (*Meux* v. *Jacobs*, 7 L. R. Ho. Lo. 481. Sed vide *In re Trethowan*, W. N., Jan. 27, 1877, p. 16), unless the mortgagee has power to deal with the fixtures separately, *Meux* v. *Jacobs*, 7 L. R. Ho. Lo. 481. *Ex parte Daglish*, 8 L. R. Ch. App. 1072.

A deposit of an agreement for a lease by a person having only a lien upon the property will, as against the lien, create a charge for the amount advanced upon the deposit: *The Unity Joint-Stock Mutual Banking Association* v. *King*, 25 Beav. 72.

A husband, by a mere transfer, although for value, of title-deeds, of which his wife is equitable mortgagee, does not by the deposit reduce the sum secured thereby into possession, so as to defeat the right of his wife by survivorship. See *Michelmore* v. *Mudge*, 2 Giff. 183, where the husband had deposited for value title-deeds of which his wife was equitable mortgagee, and having received a part only of the mortgage-money, died before his wife. Sir *J. Stuart*, V.-C., held, that except as to the mortgage-money received by the husband, there had been no actual reduction into possession, and that consequently the wife was unaffected by her husband's transfer of the deeds.

Where a deposit has been made by a partial owner as a tenant for life, he will only thereby affect his own interest, and not that of remaindermen: *Williams* v. *Medlicot*, 6 Price, 495; *Turner* v. *Letts*, 20 Beav. 185.

For what debts an equitable mortgage may be a security.]—Ordinarily, as in *Russel* v. *Russel*, an equitable mortgage by deposit will be a security only for the sum then advanced, or which may be mentioned in the memoran-

dum accompanying it, if any; but it will not by implication only be held to include antecedent debts (*Ex parte Martin*, 4 D. & C. 457; 2 M. & A. 243; *Mountford* v. *Scott*, T. & R. 274), unless having regard to the whole transaction and the circumstances of the case, it appears to have been the intention of the parties (*Ex parte Farley*, 1 M. D. & De G. 683, 689; *Ex parte Smith, re Hildyard*, 2 M. D. & De G. 587); and the expression "may advance," in the accompanying memorandum, does not necessarily prevent the deposit from being a security for past advances. *Ib.*

Moreover a deposit of deeds, whether it be accompanied by a memorandum or not, may by evidence, either written or parol, be held to extend to subsequent advances, upon proof of an agreement that the deposit was originally made as a security as well for the first as for any subsequent advance, or upon proof that any subsequent advance was made upon the understanding that the deeds were to be a security for it (*Ex parte Langston*, 17 Ves. 227; *Ex parte Whitbread*, 19 Ves. 209; *Ex parte Kensington*, 2 V. & B. 79; *Ex parte Nettleship, re Burkhill*, 2 M. D. & De G. 124; *Ede* v. *Knowles*, 2 Y. & C. C. C. 172; *Baynard* v. *Woolley*, 20 Beav. 583, 586); for Lord *Eldon* said, that this distinction appeared to him to be too thin, that you should not have the benefit of such an agreement, unless you added to the terms of that agreement the fact that the deeds were put back into the hands of the owner, and a re-delivery of them required; on which fact there is no doubt that the deposit would amount to an equitable lien within the principle of the cases: *Ex parte Kensington*, 2 V. & B. 83.

Upon the same principle, in *James* v. *Rice*, 5 De G. Mac. & G. 461, where money had been advanced, previous to the abolition of the usury laws, at 6*l.* per cent. on a promissory note, and a deposit of title-deeds of freehold property as a collateral security, and afterwards it was agreed by parol that a legal mortgage should be executed to secure the principal, and interest at 5*l.* per cent., but no mortgage was executed, it was held by the Lords Justices, reversing the decision of Sir *W. Page Wood*, V.-C. (reported Kay, 423), that the parol agreement was sufficient to change the illegal into a legal contract, and that a return and fresh deposit of the deeds was not necessary to take the second contract out of the Statute of Frauds. "The deeds," said Lord Justice *Turner*, "being in the hands of the plaintiff, and there being a parol agreement to give him a legal mortgage, I think the case falls within the principle of *Ex parte Kensington* (2 V. & B. 79; 2 Rose, 138), and that the plaintiff is entitled to

a decree." See also *Hodgkinson* v. *Wyatt*, 9 Beav. 566.

In *Ashton* v. *Dalton*, 2 Coll. 565, a debtor had deposited his title-deeds with his creditor until such time as his account should not exceed 100*l.*, at which time they were to be restored to him. The debtor died indebted to the creditor in 274*l.* It was held by Sir *J. L. Knight Bruce*, V.-C., that the deeds so deposited were a security for the whole 274*l.*

Although the deposit of deeds has been merely for the purpose of securing a simple contract debt, the debt will bear interest from the date of the deposit and by reason of it, though there be no express contract as to interest: see *Carey* v. *Doyne*, 5 Ir. Ch. Rep. 104: a decision of the Master of the Rolls in Ireland, where 5*l.* per cent. interest was allowed, and which has since been followed by *In re Kerr's Policy*, 8 L. R. Eq. 331, where, however, only 4*l.* per cent. was allowed; but see *Ashton* v. *Dalton*, 2 Coll. 565.

As a general rule an assignee of a mortgagee can be in no better position than the mortgagee; hence upon a transfer of a mortgage, which in the case of a mortgage by deposit may be made by a delivery of the deeds without the memorandum, should there be one (*Ex parte Smith, re Hildyard*, 2 M. D. & De G. 587), the assignee, if the assignment be without privity of the mortgagor, will take subject to the account between the mortgagor and mortgagee (*Matthews* v. *Wallwyn*, 4 Ves. 118); nor can anything be added to what is due, or interest turned into principal. *Ib.*

To whom the benefit of an equitable mortgage may be extended.]—The benefit of an equitable mortgage by deposit may be subsequently extended to persons who were not originally depositees. Thus, where a deposit of deeds has been made with a firm, if it was the intention of the parties that the deposit should be for the benefit of any future members of a firm, it is necessary that such intention should either be expressly stated in the memorandum made on the deposit, or be proved by parol evidence (*Ex parte Kensington*, 2 V. & B. 79, 83);—but dealings with the new firm may afford sufficient evidence of a new agreement with them, so as to give them the benefit of the deposit: *Ex parte Oakes, re Worters*, 2 M. D. & De G. 234. See also *Ex parte Smith, In re Gye*, Ib. 314.

It seems, however, that parol evidence without a memorandum in writing, is not admissible to prove that a man who holds deeds as a security for his own debt holds them also as trustee to secure the debt of another: (*Ex parte Whitbread*, 19 Ves. 209, 1 Rose, 299). It would be otherwise where the depositary has himself advanced nothing. "This

case," observed Lord *Eldon*, C., "has occurred: a person, with whom deeds were deposited, having advanced nothing, could not be the person who was to have an interest in the estate; and where there has been a dealing with the estate by a third person, who had made an advance by connecting 'that' dealing with the *only* advance by that person, the deposit has been held a security for him" (19 Ves. 218).

And new owners of property may so have acquiesced in a deposit by the former owners as to be equivalent to a re-deposit. Thus, when before the formation of a company in working a coal mine, the lease of the coal mine was deposited with a bank as security for the current account of the then owners of the mine, and after the company was formed and the mine was assigned to them, the lease was allowed by the directors to remain with the bank, this was held equivalent to a re-deposit of the lease by the company—an equitable mortgage created by the company: *In re Wynn Hall Coal Co.*, 10 L. R. Eq. 515, 520.

Bankers by the usage of trade, which being part of the law merchant, and is therefore judicially noticed, have a general lien on all securities deposited with them as bankers by a customer (*Davis* v. *Bowsher*, 5 T. R. 488; *Bolton* v. *Puller*, 1 Bos. & P. 539; *Bolland* v. *Bygrave*, 1 Ry. & Moo. 279; *Giles* v. *Perkins*, 9 East, 12; *Bosanquet* v. *Dudman*, 1 Stark. 1; *In re European Bank, Agra Bank Claim*, 8 L. R. Ch. App. 41). So likewise have stockbrokers (*Jones* v. *Peppercorne*, Johns. 430); and although a general lien will not exist if there be an express contract, or circumstances that show an implied contract inconsistent with such lien (*Brandão* v. *Barnett*, 3 C. B. 519, 12 C. & F. 787; *Rock* v. *Gorrisen*, 2 De G. F. & Jo. 434; *Locke* v. *Prescott*, 32 Beav. 261; *Wylde* v. *Radford*, 9 Jur. (N. S.) 1169; 33 L. J. (N. S.) Ch. 51; 12 W. R. (V.-C. K.) 38; *Macnee* v. *Gorst*, 4 L. R. Eq. 325; *Vanderzee* v. *Willis*, 3 Bro. C. C. 21; *Leese* v. *Martin*, 17 L. R. Eq. 224), nevertheless, a deposit to secure a specific sum will not prevent a general lien from attaching. *Jones* v. *Peppercorne*, Johns. 430; *In re Joseph Williams*, 3 I. R. Eq. 346.

As against whom a deposit of title-deeds is good.]—A deposit of deeds is good as against the Crown, if made before the depositor became a debtor to the Crown, by record or specialty (*Casberd* v. *Ward*, 6 Price, 411; *S. C.*, Dan. 239); unless it were made in favour of a person in whom it was a breach of duty to the Crown to take it. *Broughton* v. *Davies*, 1 Price, 216.

So, also, a deposit, as in the principal case, is valid as against the creditors of a bankrupt, unless

it were made so near the bankruptcy in point of time, that, not being given under pressure, it may be held a fraudulent preference: in which case the depositary will, upon a petition, be ordered to deliver up the deeds: *Ex parte Ainsworth, re Goren*, 3 M. & A. 457.

It may be considered now as finally decided (notwithstanding the stat. 1 & 2 Vict. c. 110, which gives to a judgment the effect of an equitable charge upon the land of the debtor), that an equitable mortgagee, by deposit of title-deeds, retains his right in equity to enforce his security against the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an elegit, without notice of the equitable mortgage: *Whitworth* v. *Gaugain*, 3 Hare, 416, affirmed by Lord *Lyndhurst*, C., 1 Ph. 728; *Abbott* v. *Stratton*, 9 Ir. Eq. Rep. 233; *Anderson* v. *Kemshead*, 16 Beav. 329, 344; *Battersby* v. *Homan*, 2 Ir. Ch. Rep. 232.

An equitable mortgagee being a purchaser for valuable consideration pro tanto, his charge will, under 27 Eliz. c. 4, be effectual against a prior voluntary settlement. *Ede* v. *Knowles*, 2 Y. & C. C. C. 172; *Lister* v. *Turner*, 5 Hare, 281.

Although a husband, by a mere transfer for value of title-deeds, of which his wife is equitable mortgagee, does not thereby reduce the sum secured into possession, he will effectually do so to the extent of any money he actually receives. See *Michelmore* v. *Mudge*, 2 Giff. 183, where the husband had deposited for value title-deeds of which his wife was equitable mortgagee, and having received a part only of the mortgage money, died before his wife. Sir *J. Stuart*, V.-C., held, that except as to the mortgage money received by the husband, there had been no actual reduction into possession, and that consequently the wife was unaffected by her husband's transfer of the deeds.

"In the present case," said his Honor, "the only act of the husband which can be urged as a reduction into possession was, his dealing with the title-deeds, which were in his possession in right of his wife, who was the mortgagee. These title-deeds were unquestionably chattels which the husband held in right of his wife. He had the present right to call in the mortgage monies, and if he had done so, the right of the wife would have been wholly extinguished.

"But what the husband did was to receive a part of the mortgage money; and—having in his possession the title-deeds, which were his wife's chattels, though held only as a security for money, —he deposited these deeds for his own benefit in the hands of a person who held them as a security by way of equitable mortgage.

As to so much of the money as was actually received by the husband, there was a complete reduction into his possession, so as to defeat the wife's title by survivorship. But as to the rest, the mere possession of the deeds cannot be equivalent to the possession of the money. If the husband's possession of the deeds is not sufficient to bar the wife's right, his transfer of that possession cannot on principle make any difference; in order to defeat the wife's title, it must be shown that the assignee exercised the right which he acquired by the deposit of the title-deeds. But nothing of the kind was done, and therefore the transaction amounted to nothing more than the deposit by the husband of his wife's chattels as a security for his debt, with a right in the assignee to reduce the property into possession, which was not exercised. Then how does the case now stand? The husband died, leaving the right of reduction into possession unexercised by himself or his assignee, and therefore the title of the wife, by survivorship, arose on his death."

A memorandum of a deposit of deeds made in Ireland as a security for a debt, by a person carrying on there the ordinary business of a banker, is within the provisions of 33 Geo. 2, c. 14 (Ir.), and ought according to their requirements to be registered in order to be valid as against creditors under a trust deed executed pursuant to the provisions of that act: *Copland* v. *Davies*, 5 L. R. Ho. Lo. 358.

As a general rule, an equitable mortgagee is liable to all the equities affecting the depositor. Thus, in *Parker* v. *Clarke*, 30 Beav. 54, Clarke, who was the transferee with notice of a mortgage obtained without consideration, deposited the mortgage and transfer with Phillips, who had no notice of the circumstances under which the mortgage had been obtained. Sir *John Romilly*, M. R., held that Phillips could only take what Clarke could give him, and that he could not be in a better situation than Clarke himself; that Phillips "ought to deliver up the deeds, and his only remedy was against Clarke."

So where a trustee deposits title deeds in breach of trust, it is immaterial whether the depositary has notice of the trust or not; because he takes only an equitable interest, which must yield to the prior equity of the cestui que trust: *Manningford* v. *Toleman*, 1 Coll. 670; and see *Welchman* v. *The Coventry Union Bank*, 8 W. R. (V.-C. W.) 729.

So where a trustee, in whose name railway shares are standing, deposits certificates of the shares by way of equitable mortgage with a person who takes no steps to be registered as owner of the shares, the earlier title of the cestui que trust will prevail over

that of the equitable mortgagee. *The Shropshire Union Railways and Canal Company* v. *The Queen*, 7 L. R. Ho. Lo. 496, reversing *S. C.*, reported 8 L. R. (Q. B.) 420.

And the mere fact of the cestui que trusts of railway shares registered in the name of a sole trustee, allowing him to have possession of the certificates of the shares which the trustee deposits by way of equitable mortgage, will not have the effect of postponing the prior title of the cestui que trusts to that of the equitable mortgagee. For the cestui que trusts are justified not only in having stock in the name of a sole trustee, but they are also justified in giving him the certificates, which do no more than tell that which any person would have found out by looking at the books of the railway company, namely, that the stock stood in his name. *Shropshire Union Railways and Canal Company* v. *The Queen*, 7 L. R. Ho. Lo. 496, 509.

Priorities as between equitable mortgagees and others.]—As a general rule, a legal mortgagee without notice of a former equitable mortgage at the time he made his advance, will be entitled to priority over it, for the equities being equal, the law must prevail: *Plumb* v. *Fluitt*, 2 Anst. 432. But if the legal mortgagee advanced his money with notice of the deposit, he will be postponed to it: (*Birch* v. *Ellames*, 2 Anst. 427; *Hiern* v. *Mill*, 13 Ves. 114;) unless perhaps where the solicitor of the depositor has the deeds as equitable mortgagee, because a subsequent purchaser having notice merely of the fact that the deeds are in the possession of the solicitor, will not be considered to have notice of the equitable mortgage, as it is the usual course of affairs that a solicitor should have his client's deeds. A solicitor, therefore, upon his becoming equitable mortgagee, should, in order to affect third parties, give express notice to them: see *Bozon* v. *Williams*, 3 Y. & J. 150.

A legal mortgagee will not, however, be postponed to a prior equitable one, upon the ground of his not having got in the title-deeds, unless there be fraud, or gross and wilful negligence on his part; and the Court will not impute fraud, or gross or wilful negligence to the mortgagee, if he has bonâ fide inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; but the Court will impute fraud, or gross and wilful negligence to the mortgagee if he omits all inquiry as to the deeds: *Hewitt* v. *Loosemore*, 9 Hare, 458; and see notes to *Le Neve* v. *Le Neve*, L. Cas. Eq. vol. ii. In *Ratcliffe* v. *Barnard*, 6 L. R. Ch. App. 652, an equitable mortgagee with whom some of the title-

deeds of the mortgaged property, including the conveyance to the mortgagor, were deposited, filed a bill to establish his priority over a subsequent legal mortgagee whose solicitor had omitted to examine a parcel which was given to him previously to the execution of the mortgage deed, and purported to contain all the title-deeds, but contained only the earlier deeds. It was held by Sir *W. M. James*, L. J., that there was not such wilful negligence on the part of the solicitor as to fix the legal mortgagee with constructive notice of the prior charge, so as to entitle the equitable mortgagee to enforce in equity his priority over the legal mortgagee.

Where a legal mortgagee, by his negligence in giving up the title-deeds, enables the mortgagor to commit a fraud by depositing them, so as to create an equitable mortgage, the legal mortgagee will be postponed to such equitable mortgagee if he had no notice of the legal mortgage. See *Briggs* v. *Jones*, 10 L. R. Eq. 92; there the plaintiff, a mortgagee of leasehold property, lent the lease to the mortgagor, for the purpose of raising money upon it, but at the same time told the mortgagor to inform the person from whom he proposed to borrow the money, that the plaintiff had a prior charge. The mortgagor borrowed money from his bankers, upon the security of a deposit of the lease, without giving them notice of the plaintiff's mortgage. It was held by Lord *Romilly*, M. R., that the plaintiff's mortgage ought to be postponed to that of the bankers. See also *M'Henry* v. *Davies*, 10 L. R. Eq. 88; *Perry-Herrick* v. *Attwood*, 25 Beav. 205; 2 De G. & Jo. 21.

And the result is the same, where, although the legal mortgagee is innocent, a fraudulent deposit has been made by his agent, whom, by the trust he placed in him, he enabled to commit a fraud: *Hunter* v. *Walters*, 11 L. R. Eq. 292; 7 L. R. Ch. App. 75.

Upon the same principle an equitable mortgagee, by deposit of title-deeds, is entitled to preference over the lien of a vendor who conveyed the estate without receiving his purchase-money when the receipt for it is indorsed on the conveyance, which is with the other title-deeds delivered to the purchaser; because the equity of the mortgagee, being better than that of the vendor, who by his negligence enabled the purchaser to deal with the estate, ought to prevail over mere priority in point of time. See *Rice* v. *Rice*, 2 Drew. 73, and the authorities cited in Vice-Chancellor *Kindersley's* elaborate judgment. See also *ante*, p. 358.

As a general rule, where there are two or more equitable mortgagees, they will rank according to

their priorities in point of date; according to the maxim qui prior est tempore, potior est jure: *Roberts* v. *Croft*, 24 Beav. 223; 2 De G. & Jo. 1; *Dixon* v. *Muckleston*, 8 L. R. Ch. App. 155. Where, however, an equitable mortgagee, either by neglecting to get (*Layard* v. *Maud*, 4 L. R. Eq. 397), or by giving up (*Waldron* v. *Sloper*, 1 Drew. 193) the title-deeds by fraud or gross and wilful negligence, enables another to create a subsequent equitable mortgage, he may be postponed to such subsequent equitable mortgagee. See *Waldron* v. *Sloper*, 1 Drew. 193; there Sloper, in 1834, made an equitable mortgage by deposit of title-deeds to Matthews. In January, 1840, Matthews deposited these deeds with Waldron, the plaintiff, by way of equitable mortgage. In April, 1842, Matthews applied to the plaintiff for the loan of the deeds, telling him he wanted them to enable a purchase to be completed and promising to return them forthwith. He did not return them, and the plaintiff never applied to have the deeds back for more than four years. In May, 1843, Matthews deposited the deeds, by way of mortgage, with Pinckney. It was held by Sir *R. T. Kindersley*, V.-C., that Pinckney was entitled to priority over the plaintiff. "It is an elementary principle," said his Honor, "that a party coming into equity in such a case, is bound to show that he has not been guilty of such a degree of neglect as to enable another party so to deal with that which was the plaintiff's right, as to induce an innocent party to assume that he was dealing with his own. If, here, ordinary diligence had been used by the plaintiff, if, instead of resting satisfied with the excuses of Matthews, he had insisted on the deeds being returned, not in one or two months, but even in nine or twelve months, even then, in the events that have happened, Matthews could not have committed the fraud. But Matthews having committed the fraud in 1843, in consequence of the neglect of the plaintiff from then to December, 1846, Pinckney was induced to go on making advances to Matthews on the faith of his possession of the deeds. If ever there was a case in which, as between two innocent parties, that one must suffer who has permitted the fraud to be committed, it is this case; and I am of opinion that the plaintiff, who by his great neglect put it in the power of Matthews to commit the fraud, has no right to come and ask equity to interfere." See *Adsetts* v. *Hives*, 33 Beav. 62.

The same rule as to priorities between equitable mortgagees by deposit applies when part of the deeds have been deposited with one person and part with another. See *Roberts* v. *Croft*, 24 Beav.

223; 2 De G. & Jo. 1; *Dixon* v. *Muckleston*, 8 L. R. Ch. App. 155.

An equitable mortgagee, who advanced his money bonâ fide, may protect his equitable estate and gain priority, by obtaining the legal estate from his debtor, even in contemplation of his bankruptcy. "So much," observes Lord *Eldon*, "is the equitable title from the possession of the deeds recognised, even at law, that if a man, having made the deposit previously, makes a title accordingly, only two minutes before he absconds, it is a legal title, and cannot be impeached; for, though the legal act was done in contemplation of bankruptcy, it is protected by the previous equitable title; being only effect given to a title created not in contemplation of bankruptcy, and, except in form, complete by the deposit."—Per Lord *Eldon* in *Hiern* v. *Mill*, 13 Ves. 122; see also *Baynard* v. *Woolley*, 20 Beav. 583.

An equitable mortgagee by a deposit of title deeds of lands in Middlesex, if accompanied by a memorandum of deposit, is within the provision of the Registration Act, 7 Anne, c. 20, and by earlier registration of the memorandum accompanying the deposit, even on the same day, will acquire priority over another equitable mortgagee prior in date, but subsequent in registration: *Neve* v. *Pennell*, 2 H. & M. 170; *Moore* v. *Culverhouse*, 27 Beav. 639; *In re Wight's Mortgage Trust*, 16 L. R. Eq. 41; *Credland* v. *Potter*, 18 L. R. Eq. 350; 10 L. R. Ch. App. 8, overruling *Wright* v. *Stanfield*, 27 Beav. 8. We have seen before (p. 736, *ante*) that a mere deposit of deeds without a memorandum cannot be registered. The question, then, naturally suggests itself whether, that being the case, a mere mortgage by deposit will be postponed to a subsequent registered mortgagee, who advanced his money without express notice of the mortgage by deposit. In Ireland it has been decided by *Lynch*, J., in the Landed Estate Court that the equitable mortgagee would be so postponed. See *M'Kinney* v. *Sproule*, 6 I. R. Eq. 445.

Privileges and remedies of equitable mortgagee.]—A mere depositary of a lease cannot be compelled to take a legal assignment so as to enable the lessor to sue him at law on the covenants in the lease, nor is he liable to them until he has made himself legal assignee (*Moore* v. *Choat*, 8 Sim. 508, and cases there cited: and *Robinson* v. *Rosher*, 1 Y. & C. C. C. 7; *Moore* v. *Greg*, 2 De G. & Sm. 304; 2 Ph. 717, overruling *Lucas* v. *Comerford*, 1 Ves. jun. 235, and *Flight* v. *Bentley*, 7 Sim. 149);—nor will the case be altered by his having entered into possession of the premises and paid the rent: *Moore* v. *Greg*, 2 De G. & Sm. 304; 2 Ph. 717;

Walters v. *The Northern Coal Mining Company*, 5 De G. Mac. & G. 629; *Cox* v. *Bishop*, 8 De G. Mac. & G. 815.

A proviso making void a lease upon an assignment does not apply to a mere deposit of it: *Ex parte Cocks*, 2 Deac. 14; *Ex parte Sherman*, Buck, 462; *Ex parte Baglehole*, 1 Rose, 432.

A judgment registered in Ireland as a statutory mortgage does not merge with a prior equitable mortgage by deposit of title deeds. Hence, although such statutory mortgage may have been avoided under section 331 of the Irish Bankrupt and Merchant Act, 1857 (20 & 21 Vict. c. 60), by reason of a petition having been filed within three months against the judgment debtor, under which he was adjudicated bankrupt, it has been held that the mortgage by deposit of deeds still remained a security unmerged as an equitable security. *In re Estate of Assignees of Elliott*, 8 I. R. Eq. 565.

The realization of mortgage securities in bankruptcy (including equitable mortgages) is now regulated by the 40th section of the Bankruptcy Act, 1869) 32 & 33 Vict. c. 71), and the general rules 78, 79, 80, and 81, made pursuant thereto, and which are almost identical with rules 55—8 of the 19th of October, 1852, under the Bankruptcy Act, 1849, which were substituted for Lord *Loughborough's* Order of the 8th of March, 1794.

In the case of a stale demand, as where there was no memorandum, the deposit of deeds had been made twelve years before, and the bankrupt dead, the Court has refused to make the usual order for a sale (*Ex parte Jones*, 3 M. & A. 152), but an inquiry has been directed as to the circumstances attending a doubtful deposit. *Ex parte Clouter*, 7 Jur. 135.

In bankruptcy, an equitable mortgagee, except perhaps where he has actually received the rents, *Ex parte Williams*, 13 W. R. (Bankruptcy) 564, is entitled to them from the time only of the order for sale, which is considered equivalent to the appointment of a receiver: *Ex parte Bignold*, 2 M. & A. 16; *Ex parte Carlon*, 3 M. & A. 328; 2 Deac. 333; *Ex parte Thorpe*, 3 Deac. 85; 3 M. & A. 441. Notice to the tenants to pay rent to the mortgagee does not alter the rule: *Ex parte Burrell*, 3 M. & A. 439; *Ex parte Scott*, 3 M. & A. 592.

As to a sale in bankruptcy of property comprised in an equitable mortgage, see Robson on Bankruptcy, 4th ed.

The depositary of deeds may take proceedings in the Court of Chancery for foreclosure, and an absolute conveyance, but not for sale (*James* v. *James*, 16 L. R. Eq. 153; *Pryce* v. *Bury*, 2 Drew. 11; 16 L. R. Eq. 153 n.); and he is entitled to a declaration that his deposit operated as a mort-

gage, and that in default of payment of what may be found due, the mortgagor is a trustee of the legal estate for him; and then the decree goes on to order the mortgagor to convey the estate to him (*Marshall* v. *Shrewsbury*, 10 L. R. Ch. App. 254); and six months will be allowed for redemption: *Parker* v. *Housefield*, 2 My. & K. 419; *Meller* v. *Woods*, 1 Kee. 16.

The doctrine that an equitable mortgagee by deposit of title-deeds is entitled to foreclosure does not extend to a pledgee of personal chattels. *Carter* v. *Wake*, 4 Ch. D. 605.

Although trustees may deposit deeds relating to charitable trust property, in order to secure money properly expended for the purposes of the trust, the Court will not, it seems, decree a foreclosure or sale, because it would thereby destroy the trust altogether: *Darke* v. *Williamson*, 25 Beav. 622.

A decree for foreclosure against an infant, notwithstanding it is enacted that the parol shall not demur (11 Geo. 4 & 1 Will. 4, c. 47, ss. 10 and 11), formerly gave him a day to show cause against the decree after he attained twenty-one (*Price* v. *Carver*, 3 My. & Cr. 157; *Scholfield* v. *Heafield*, 7 Sim. 669; *sed vide* Fish. Mort. 1085); but a decree for sale against an infant will be immediate if it appears that such sale will be beneficial, and no day will be given him: *Redshaw* v. *Newbold*, 12 Jur. 833; and see Seton on Decrees, 689, 3rd ed.

On making an order of foreclosure absolute, Sir *J. Stuart*, V.-C., refused to add a declaration under the Trustee Act, 1850, that the mortgagor being out of the jurisdiction is a trustee, in order to found upon it a subsequent application for a vesting order, his Honor observing, that "any such order, if made, must be made on a separate application:" *Smith* v. *Boucher*, 1 Sm. & G. 72.

An equitable mortgagee may obtain a receiver (*Curling* v. *Lord Leycester*, 19 Ves. 633; *Shakell* v. *Duke of Marlborough*, 4 Madd. 463; *Anderson* v. *Kemshead*, 16 Beav. 329); and he will be entitled to one on motion before the hearing, on showing the possession of deeds, which raises a primâ facie presumption that the deposit was made for the purpose of securing an advance of money: *Bodger* v. *Bodger*, 11 W. R. (V.-C. K.) 160.

Under the Judicature Act, 1875, s. 10, in insolvent estates an equitable mortgagee may come in and prove in an administration suit, and in the winding up of any company, on his whole debt, upon giving up his security, or he may prove for the deficiency if he does not give up his security.

In cases, however, where the mortgagor died before the Act came into operation, it was held that the mortgagee was entitled,

without prejudice to his security, to prove for and take a dividend upon the entire debt, so that he did not ultimately receive more than twenty shillings in the pound from all sources: *Rhodes* v. *Moxhay*, 10 W. R. (V.-C. S.) 103.

An equitable mortgagee by deposit of a lease relating to lands in Ireland, where the lessee has been evicted for nonpayment of rent under the Irish Ejectment Acts, may file a bill for redemption against the landlord: *Geraghty* v. *Malone*, 3 D. & War. 239; 1 H. L. Cas. 81.

An equitable mortgagee by deposit of deeds is not deprived of his right to recover his debt by his inability to produce either the deeds deposited or the memorandum of deposit, when the Court believes that there was such a deposit, and that the deeds have been really lost (*Baskett* v. *Skeel*, 11 W. R. (V.-C. W.) 1019); but he may lose his lien by voluntarily parting with the deeds: *Re Driscoll*, 1 I. R. Eq. 285.

Where, moreover, an equitable mortgage by deposit of title-deeds has been made, accompanied by an instrument which, by mistake, has been drawn up in such a manner as to be illegal, as, for instance, void for usury, when the laws against usury were in force, the Court, on being satisfied of the error, will reform the instrument so that effect may be given to the equitable deposit. *Hodgkinson* v. *Wyatt*, 9 Beav. 566.

It may be here mentioned that where proceedings in bankruptcy have been suspended by resolutions under the 110th section of the Bankruptcy Act, 1861, and there is nothing in the resolutions to preserve the jurisdiction of the Court of Bankruptcy, its jurisdiction to order a sale on the petition of an equitable mortgagee is gone: *In re Carter*, 1 L. R. Eq. 170.

Where a trustee has been appointed under the liquidation of the affairs of an equitable mortgagor, the mortgagee may, instead of applying in bankruptcy, proceed in Chancery against the trustee for the purpose of having the security realised, the jurisdiction in Chancery not being taken away by the Bankruptcy Act, 1869: *White* v. *Simmons*, 6 L. R. Ch. App. 555.

In a case of composition the Court of Bankruptcy has no jurisdiction to make an order for sale at the instance of an equitable mortgagee of the estate of the debtor: *Ex parte Manchester and Liverpool District Banking Company, In re Littler*, 18 L. R. Eq. 249.

GARTH *v.* SIR JOHN HIND COTTON.

July, 1750. *August* 10*th*, 1750.

[REPORTED 1 VES. 524, 546; 1 DICK. 183.]

S. C. 3 Atk. 751; Reg. Lib. 1752, A., fol. 240.

EQUITABLE WASTE.]—*A., tenant for ninety-nine years, if he should so long live, without impeachment of waste, voluntary waste excepted; remainder to trustees during his life, to preserve contingent remainders; remainder to his first and other sons in tail; remainder to B. in fee. A. (before a son born) and B., according to agreement, cut down timber, and divided the profits between them. A. afterwards had a son, who was held entitled to recover from the representative of B. what he had so received as his share of the money arising from the sale of the timber.*

Rights, powers, and duties of trustees to preserve contingent remainders.

MR. GARTH (*a*), tenant for ninety-nine years, if he should so long live, *without impeachment of waste, excepting voluntary waste;* remainder *to trustees during his life, to preserve contingent remainders;* remainder to his first and every other son in tail; remainder to the defendant, Sir John Hind Cotton, in fee.

(*a*) The statement of the case and the arguments are taken from 1 Ves. 524.

Garth having been long married without having children, enters into an agreement with the defendant, Sir John Hind Cotton, to cut down timber on the estate, and divide the profits between them.

He has afterwards a son by another wife, who, after his father's death, when of age, and having suffered a recovery, brings this bill to oblige the defendant, Sir John Hind Cotton, to refund 1000*l.*, received by him as his share of the money arising from sale of the timber, with interest.

Argument for the plaintiff.

For the Plaintiff.—There is no particular precedent exactly as the case stands; therefore it must depend on general principles. The question is, whether they had a right to cut timber; and if not, whether the plaintiff thereby is injured, which is necessary for the plaintiff to show, and that the defendant, at the time of doing it, was wilfully guilty of an injury to the plaintiff —that is, the unborn children of Garth; for, if this is a damage without an injury, the Court will not give satisfaction.

The trustees were to preserve the contingent uses of everything that was settled. To avoid a perpetuity was this method of preserving estates in families a certain time by inserting trustees; which (said to be invented by Lord *Bridgman*) has been since extended by a Court of equity. If trustees joined, the Court would make them liable for a breach. It was by some conveyancers doubted whether the trustees joining could bar, which came first in *Pye* v. *George* (*a*), where Lord *Harcourt* said, that destroying contingent remainders was a wrong, and that he would make a precedent if there was none. That precedent was afterwards solemnly made in *Mansell* v. *Mansell* (*b*), where a Court of equity went further than ever, holding a purchaser to be a trustee for a contingent remainder-man. Every one doing it with notice is affected with the trust; and if the estate is got into such hands as not to be followed in equity, the Court would make the trustees liable for the breach. Thus it is on inheritances of land: a tree growing on the estate is as much a part of the inheritance as a house or the land; and, as to the person interested, selling the timber is as much to the destruction of his inheritance as selling the land. Though there is no remedy at law, the trustees might have complained in equity that they were to preserve the contingent remainders, which might be in esse perhaps in a year, and that the Court should not suffer the present tenant for life to be guilty of that permissive waste, because it is a prejudice to one who may be in esse, and was

(*a*) 2 Salk. 680; Prec. Ch. 308; 1 P. Wms. 128; 7 Bro. P. C. 221, Toml. ed.

(*b*) 2 P. Wms. 678; Ca. t. Talb. 252.

intended by the donor to have that which is in esse. Though there is no precedent for this, yet in many cases will the Court prohibit waste, though no action of waste lies.

If, then, the Court would do so, as being a wrong, the trustees neglecting their duty, or not knowing it, will not alter the case so as to prevent that satisfaction consequential to an injury. [Lord *Chancellor Hardwicke.* I know no case where the trustees might bring such bill, though I have heard it said they might; and if this is so in case of a donee, it might be so in case of a purchaser.] In case of a purchaser, it would be contrary to common justice if the trustees might not bring such a bill; for then a man might immediately destroy the settlement he had made. Several injunctions have been granted where no action of waste could be, as in case of an intermediate estate for life: Moo. 554; where, it appears, he in remainder could have an injunction so long ago as the time of Richard II., for waste by the first tenant for life, as being an injury to his inheritance, taking away part of the value thereof. It is also an injury to the intermediate remainder-man for life, as it takes away the benefit of the shade; so that, on a bill by either, the Court would interpose, and not say, you may bring trover, but would prevent the injury. Had this been the case of an infant in ventre sa mere, entitled to the inheritance, undoubtedly a bill would lie, though he cannot bring an action, ejectment or trover, notwithstanding he may be vouched: *Musgrave* v. *Parry,* 2 Vern. 710. Then there is no reason but that a person who may come in esse should have the same equity as one who has a being of a month if it may be so called. In *Abrahal* v. *Bubb,* 2 Sho. 69 (*a*), (though a book of no authority), is cited a case called *Lady Evelin's,* not reported in print, but in Lord *Nottingham's* manuscript; where it was said, that where tenant for life, remainder to the first son for life without impeachment of waste, remainder over, the first son, by leave of tenant for life, comes on the land, and sells the trees, he was enjoined in this Court by Lord *Notting-*

(*a*) *S. C.,* 2 Freem. 53.

ham; though there could be no action at law. A bill may be brought by the patron of a living to prevent the incumbent from cutting down timber; though the interest the patron has is very little, nor any remedy in point of law, as he cannot enter, or seize the timber: but from his remote interest in the thing in possession, the Court will relieve, because the law does not effectually, and will not say that you may go to the bishop. In *Fleming* v. *Fleming*, July 19, 1744, *Bishop of Carlisle's case* (*a*), tenant for ninety-nine years, if he so long live; remainder to trustees to support contingent remainders; remainder to another for ninety-nine years, if he so long live, without impeachment of waste; remainder to his sons successively in tail male, remainders over; both tenants for ninety-nine years, thinking they had an interest together to cut down, because the second had a right to do so if in possession, agreed to sell the timber, and divide the profit, as here. On motion for injunction your Lordship granted it, holding that there was no remedy at law, and that the privilege of *without impeachment* must be considered as annexed to the estate when it comes into possession. In *Robinson* v. *Litton* (*b*), 12th December, 1741, the testator devised an estate to his eldest son and his heirs; and if he should not live to attain twenty-one, leaving no issue, devised it to his eldest daughter and the heirs of her body; remainder to his two other daughters successively in tail. The children were all infants. The son, within two years of twenty-one, petitioned to cut down timber, being for his benefit, as owner of the inheritance, though subject to that contingent interest to his sisters. Your Lordship refused it, but left him to do what he could according to law. Upon that the parties agreed, that some small timber should be cut down, and then a bill should be brought by the daughters upon their contingent interest to prevent the waste, which was done; and, though that was a remote and improbable contingency, the Court thought the felling of the timber should be stayed; not that the defendant could not do it in a point of law, for he had an estate of inheritance, and every such estate carries a right

(*a*) *Fleming* v. *Bishop of Carlisle*, cited 1 Dick. 209.

(*b*) 3 Atk. 209.

to cut timber: yet did the Court restrain him, and said, that if an estate descended to an heir-at-law where an executory devise was depending, that heir, notwithstanding he would have the legal estate of inheritance in the meantime, till the contingency happens, shall not be suffered, for the sake of those persons who may come to be interested, to fell in the meantime. But the defendant is not tenant in tail in possession, and therefore could not do it, though no son was born at the time. It was not a remote contingency; and it was determined, in *Lewis Bowles's Case* (*a*), that, if a son is born, the estate shall open. If, then, there might have been that preventive remedy by injunction, there ought to be this compensating remedy, supposing the act done. But it may be said, though fieri non debuit factum valet; for that, by the severing the property, it vested in the defendant as tenant in fee. If severed by act of God, as in the *Case of Welbeck Park* (*b*), where timber was blown down on the Duke of Newcastle's estate, it would be so from the rule of law, which says, that a tree lying on the ground shall not be held in abeyance, but go to the first owner of the inheritance, who might maintain trover for it. But this is not so severed, for they knowingly contrive the injury. If allowed, it will be in the power and the interest of tenant for life to bargain with a remainder-man, though ever so remote by giving him something he could not be entitled to at all, which would encourage these collusive agreements (*c*). So, one made tenant for life on his marriage, reversion to himself in fee, being entitled to all windfalls, might immediately strip the estate. There is no acquiescence or length of time here, which might amount to waiver of right, or afford presumption of evidence in doubtful cases; but the plaintiff was not born until ten years after, not being of age, till 1745, and pursued it recently. There is no difficulty on defendant, in point of evidence, from length of time; but if there was, he must have seen it could not have arisen till at a distance.

(*a*) 11 Co. 79; Lead. Cas. Real Prop. 27, 2nd ed.

(*b*) *Duke of Newcastle* v. *Vane*, cited 2 P. Wms. 241.

(*c*) *Lee* v. *Alston*, 1 Bro. C. C. 196.

For the Defendant.—This is a new case; and, as admitted, not well founded on law, so neither is it in equity. Argument for the defendant.

Defendant, on application by plaintiff's father, agreed, provided reasonable satisfaction was made to him, not to take the advantage of felling the timber, which he might. The bill, then, is not proper against him, without the representative of the father. At law no writ of prohibition or action of waste lay against tenant for life or years, as the parties must provide for that: since the Statute of Gloucester, indeed, it is otherwise. But to whom could the defendant be responsible? Not to the plaintiff, had he been born; for, in point of law, if he was a stranger (as a remainder-man in fee is, as to privity between him and tenant in tail), he was liable only to the lessee for life or years, who was responsible only to the person having a right to bring the action of waste; and remedy was left over against the stranger, against whom the action of waste could not be brought, as held by Lord *Coke*. Next, this is a personal tort, which dies with the party who alone was liable: then it would be extraordinary, if the representative of the party committing waste should not be liable, that the defendant (who was never liable to the person who could bring the action, nor even to the lessee for life or years, if living, as the waste was with his consent) should now account for that waste. It is admitted, that if blown down, or cut without concurrence of defendant, he would be entitled to the benefit of the whole: how, then, is it the act of the defendant? It is singly the act of the lessee for life. Suppose the lessee had given the defendant so much money not to take the benefit of it: he might have done it for a consideration, or for none at all; for why may not one renounce a right? And this amounts to the same. Though this Court will interpose to prevent waste, yet never where the estate has ceased in the person committing it. In *Jesus College* v. *Bloome* (*a*), Nov. 19, 1745, the plaintiffs had made a new lease to another; and, discovering afterwards that the former lessee had cut down timber and committed waste, brought a bill against him for an account thereof. Your Lordship dismissed it; for that where a lease determined, and possession was quitted, the Court will not decree an

(*a*) 3 Atk. 262; Amb. 54.

account; though, where the lease continues, it would decree an account of waste, as incidental to that jurisdiction, the Court has to prohibit and enjoin it. As soon as severed, the property belonged to the defendant, who might have seized it, or brought an action without seizing; for the father certainly had no other property than a special interest in the trees, while they continued annexed. [*Lord Chancellor Hardwicke.*—Suppose the trustees had been vigilant, and brought a bill to stay this waste, and prayed an account of the timber so felled under this agreement; I think that would be a proper bill: and, if the Court had made a decree, there would be an injunction to stay the waste; and, incident to that, the Court may decree an account of the waste already committed: what would the Court have directed to be done with the money raised by the timber sold?] The money even by the aid of this Court, would be decreed to defendant. *Udal* v. *Udal,* Aleyn, 81, and several other cases, shew, that the very cutting vests the property in the first owner of the inheritance. If there had been an intermediate vested remainder for life, it would make no difference; for the defendant might then have seized or brought trover, though not an action of waste; and, after the death of the intermediate tenant, might have brought *waste* for the waste in the life of that tenant. But it has never been determined, that the intermediate estate of the trustees should bar the remainder-man in fee from an action of waste or take away a legal right; which it is admitted that would not do, if they were blown down. This estate in trustees took rise on political considerations, in the time of the civil wars, to prevent any act wrongfully done to put a period to the estate; and, being created to one particular purpose, should not be wrested to another, or take away a remedy given to the owner of the inheritance by the statute. If the remainder-man in fee, by action of waste, recovers the place wasted, the remainder-man coming in esse cannot recover this estate vested; as held in the *Case of Lincoln College.* This Court will indeed, under particular circumstance, at the instance of trustees,

hearken to complaints by them; and has gone so far, in *Mansell* v. *Mansell* (*a*), as to declare what its sentiments would be in case of a breach of trust where the trustees joined. But suppose they had joined, and been parties to these articles, they would not have made the legal right of the parties in the timber, when cut, different. But they did not join, nor file such bill to stay waste: and there is no instance where the Court ever interposed on their omitting to act. If by such omission a benefit accrued to another, the Court never interposes to take it away, there being instances to the contrary; as in *Partridge* v. *Pawlet*, Hil. Vac. 1736 (*b*), before your Lordship, where plaintiff's wife, tenant for life without impeachment of waste, being a sickly person, was going to cut down timber, to the produce of which she would be entitled. A bill was filed on behalf of her sister to restrain her, for that the estate was subject to debts in aid of the personalty, which would probably not be sufficient for that. The Court granted the injunction. But, there being no deficiency in the personalty, a question arose, after the wife's death, between her husband and administrator and the sister, at whose instance the injunction was obtained upon an untrue suggestion, whether the estate should be put into the same condition as if no such injunction had been granted. The Court expressed an inclination to do so, if it could; but though it was a very hard case, and a misfortune happening by act of the Court taking away a power annexed to the tenant for life, yet, as an interest was by that means attached in a third person, the Court did not think itself empowered to take away that right. Then much less will the Court, where, by the non-opposition of the trustees, a benefit accrues to a third person. *Whitfield* v. *Bewit* (*c*) is a little defectively reported. It seems there, as if there were trustees to preserve, &c.; and, if there were, that case is a direct authority.

(*a*) 2 P. Wms. 678.

(*b*) 1 Atk. 467.

(*c*) 2 P. Wms. 240; see also *Bewick* v. *Whitfield*, 3 P. Wms. 267.

Lord Chancellor Hardwicke.—*Partridge* v. *Pawlet* is not applicable to the present case.

This is of the first impression—of great consequence

and importance in point of precedent: therefore I will take time to consider of it.

LORD CHANCELLOR HARDWICKE.—Although I have taken a great deal of pains, I cannot yet form an opinion, from an apprehension of breaking in upon the rules of law, or establishing a dangerous precedent in a court of equity. The case is admitted to be entirely new. The strength of the arguments for the plaintiff is on the authority of *Pye* v. *George* (*a*) and *Mansell* v. *Mansell* (*b*), where the Court has considered trustees to preserve contingent remainders as trustees to all other purposes, so as to be affected by breach of trust and all the consequences: and therefore, if they have been negligent in not bringing a bill to restrain the waste, it should not turn to the prejudice of the remainders, when in esse. But it deserves to be considered, whether they have any trust to preserve the timber, because their legal estate is not at all for that purpose, being only an estate pour autre vie; by which there is no interest in or power over the timber, and which is at an end as soon as the first tenant for life dies. It is said, they might bring a bill for an injunction to stay waste, before the contingent remainders vested: and I am of that opinion: but I do not know that arises out of their trust for the timber. It is a bill by amicus curiæ; as in a bill on behalf of an infant in ventre sa mere, to stay waste. Till the estate attaches in possession they have nothing to do with the timber. If, indeed, there is a forfeiture for the first tenant for life, they would have a right to the shade, &c., but nothing to do with it during the life of the tenant for life. This is no opinion, but only my doubts from the breaking in on the rules of law on the one hand, and on the other the laying down a precedent in equity which might be dangerous. Let it, therefore, be spoke to again next term. I can find no case where the Court has preserved the timber, though cut down by wrong, for the benefit of the contingent remainders. In *Whitfield* v.

10 August, 1750. The judgment is taken from 1 Ves. 546.

(*a*) 2 Salk. 680.

(*b*) 2 P. Wms. 678; Sed vide *Birch-Wolfe* v. *Birch*, L. R. Eq. 689.

(a) 2 P. Wms. 640.

Bewit (a) it was not by accident, but by wrong; and though Peere Williams has not mentioned whether there were trustees to preserve &c., I have looked into it, and find there were.

Second argument for the plaintiff.

Michaelmas Term, 1750, it was argued again.

For the Plaintiff.—The bill is against the defendant only so far as he has been benefited himself by agreeing to this act, which is a detriment to the plaintiff's inheritance. The case is new in specie, but the Court will go on the general principles of law and equity. The whole merits depend on two points: *first*, whether on application by the trustees at the time of the agreement, the Court would have restrained them both—the tenant for ninety-nine years from cutting by licence of the remainder-man, and the remainder-man from coming upon the estate by licence of the tenant; *next*, if so, whether satisfaction ought not to be decreed for that act, when done, which the Court would have prevented, as against conscience.

As to the *first*. To shew that the Court would have done so, it is necessary to state the notion of justice established as to preserving timber, houses, mines, and other things, capable of being, in fact, severed from the inheritance, and which yet are part of it in notion of law, and considered as annexed. There are but four cases in which a court of equity interposes to preserve an inheritance entire. First, where there is no legal remedy whatever that extends so far as to answer the intent of the settlement under which all claim, and from which intent it is clear that what is doing is wrong. This holds where tenant in tail apres possibility &c. (b), or wife tenant in tail ex provisione viri, goes to pull down houses, or commit destruction. No action of waste or of property can be brought, yet this Court will enjoin: *Abrahal* v. *Bubb*, 9 Sho. 69 (c), and *Cooke* v. *Whaley*, 1 Eq. Ca. Ab. 400; because the mansion-house is settled as well as the rest; and this tenant in tail apres, &c. is but tenant for life, who could not do it, though he was so, without impeach-

(b) After possibility of issue extinct.

(c) 2 Eq. Ab. 757; 2 Freem. 53; 2 Swanst. 272, n.

ment of waste. This is the most ancient jurisdiction of equity—in the time of Richard II. (Moor, 554), and several precedents in Henry VIII. and Edward VI.; but since the *Case of Ruby Castle* (*a*) it is established. There was tenant, without impeachment of waste (which since *Lewis Bowles's case* (*b*), gives leave to commit waste), yet would not this Court suffer it because contrary to the form of the settlement, though there was no legal remedy. On the same principle have been cases as to an avenue in a park for ornament or shelter. Secondly, where there is a temporary impediment to the remedy at law, so that the act is at the time dispunishable, equity interposes; as, where there is an intermediate tenant for life, the remainder-man of inheritance cannot bring an action for waste by the first tenant for life, for the sake of the preservation of the innocent remainder for life: 2 Inst. 301. It is not so if it was a remainder for years, and it would not be destroyed by the action. But a stronger case is of an estate for life, remainder for life, without impeachment of waste, and with a power to commit waste: both agree to commit waste, and though dispunishable at law, yet this Court would enjoin, on the principle that it was an injury to the inheritance, although it was a bare contingency whether it would be a prejudice to the owner of the inheritance or not; which was *Lady Evelin's case* (*c*): so in *Fleming* v. *Fleming*, though no remedy at law. The third case where there is a remedy in equity only, is, where a person, who may be consequentially injured by the waste, from the weakness of his estate, has no remedy at all at law: as where tenant for life: remainder for life, with or without impeachment of waste: remainders over,—on the bill of remainder-man for life, the Court would restrain the first tenant for life from committing waste: *Dayrell* v. *Champness* (*d*). If guardian of infant tenant in tail cuts down the whole timber, the Court will not, on application of the remainder-man, enjoin; which was *Saville* v. *Saville* (*e*), although the infant there was very ill, and did die before he came of age: but if done in such a way as to be to the prejudice

(*a*) *Vane* v. *Lord Barnard*, Prec. Ch. 454; Gilb. Eq. Rep. 127; 1 Eq. Ab. 399; 1 Salk. 161; 2 Vern. 738.

(*b*) 11 Co. 79.

(*c*) Cited 2 Freem. 55.

(*d*) 1 Eq. Ab. 400.

(*e*) *Saville's case*, Mos. 224; cited Ca. t. Talb. 16.

of the infant himself, on the application of the infant, the Court will judge what is for his benefit. The fourth, and most material to the present case, is where new limitations are introduced and allowed by law and courts of justice, since the time that all the doctrine about waste was settled. Since the Statute of Gloucester, (6 Edw. 1, c. 5) courts of law cannot adapt their remedy to a new purpose: then the Court interposes on the foundation of justice, and on the principle, that, this new sort of limitation being introduced, it must be protected in all its consequences, because the limitation itself the law allows. Executory devises and springing uses existed not before the time of King Henry VIII. Then none of the rules at law concerning waste can be applied to them; and any man, having a fee subject to be defeated on a contingency, may, in point of law, pull down houses and cut down all the timber: no legal remedy, as action of waste or trover for the timber, lies, nor a prohibition; but in equity there is a remedy. In *Robinson* v. *Litton* (*a*), the inheritance being given over to the daughters on a contingency, your Lordship thought the intent was that the whole and every part of the inheritance should be preserved to wait that contingency, and that a bill may be brought for infant in ventre to stay waste, the statute of King William (*b*) having declared him capable of taking—that is, preserved a contingent remainder to him; yet that infant has no legal remedy, nor after his birth can he bring trover. This Court then interposes, because the law does not. When the legal remedy about waste was established, no such thing was known in the law as a contingent remainder which might not be destroyed by the tenant for life and first owner of the inheritance. It was of no value at all: and then why should part be preserved?—which was the ground of the determination in *Udal* v. *Udal* (*c*), and 1 Rol. Ab. 119 (*d*). This limitation, being for years, could not then exist at all, as there must be a freehold to support the contingent remainders; but it is now allowed being introduced at the time of the troubles, about 1640, by Sir *Geoffrey Palmer*, who invented it for preservation

(*a*) 3 Atk. 209.

(*b*) 10 & 11 Will. 3, c. 16.

(*c*) Aleyn, 81.

(*d*) *Uvedale* v. *Uvedale.*

of contingent remainders; but no legal remedy is adapted to it. The Court, then, will act on the same principles as in executory devises, which are very like this, being a limitation to arise on a contingency. Where, indeed, there are no trustees to preserve, &c., this Court would not grant an injunction to stay waste against tenant for life, and first owner of the inheritance, who, by the rule of law, may, notwithstanding the contingent remainders, do what they will with the whole estate, and then may with part of it; this Court not relieving against a general rule of law. But, now such trustees are allowed and approved of, they must execute this trust according to the different remedy the constitution allows, to preserve every part of it: so that, if tenant for life levies a fine, his particular estate is forfeited; they shall enter, but though they do not, their right of entry shall preserve all the contingent remainders. If he fells timber, there is no remedy at law; they must apply to this Court; and it is established, that, on an executory devise, this Court will interpose. But they are more emphatically entitled to this here; for the very purpose for which they have an estate for life is to preserve the contingent estate afterwards to arise, this Court considering it as an executory trust; so that if they had brought a bill, both would have been prevented, because both were doing an injury—the owner of the inheritance, in cutting down before it was his day, as in *Lady Evelin's Case* (*a*); and it would be of very extensive consequence if a Court of equity should not interpose, when there is no legal remedy adequate. A right without a remedy is a solecism; this Court finds one, as in case of infant in ventre, of executory devises, and where there are temporary impediments. If, on such a bill by the trustees, the Court would not restrain, the argument must be given up. None but the trustees could apply; for, though any one may file a bill in the name of an infant in ventre, considered as having existence in many cases, it is not so here; but the trustees, who have a foundation to go upon, as having a remainder themselves prejudiced by this act, can alone apply.

(*a*) Cited 2 Freem. 55.

If, then, the trustees, through ignorance or neglect, did not bring such bill, the *second* consideration arises, whether satisfaction ought not to be made now. Should this Court say, they only enjoin, there is no adequate remedy, for it might be then done by surprise. Lord Barnard was not only restrained, but obliged to make satisfaction and restore, on the principle that the Court would have prohibited him, and that complete justice could not otherwise be done. Where trees are cut down, specific satisfaction cannot be decreed; it then is only by way of compensation by damages. A bill to stay waste draws after it an account of the waste committed. If the injunction is disobeyed, an attachment would issue: the terms on which the Court would suffer the contempt to be cleared would be on paying costs of the contempt, and making, satisfaction as far as could be for the commitment is only a mean, and otherwise no one would value risking the contempt. It is a maxim, that neither infant nor person unborn can suffer by laches of a trustee, or of the person who ought to act; but the doctrine contended for would put their fate in the power of these trustees. If trustees join in destroying contingent remainder, it would take effect at law, but this Court would set it up again, and, if it got into the hands of a purchaser without notice would make tenant for life, and every one who joined, make satisfaction. If indeed the trees were blown down, or cut by wrong or trespass, without permission of the owner of the inheritance, the property would, ex necessitate, be the defendant's, as it cannot be in abeyance, and the severance was without default: there would be nothing of which this Court could lay hold of against his conscience. *Whitfield* v. *Bewit*, as in 2 P. Wms. 240, is no authority in the present case. On searching the register, it appears, indeed, that there were trustees; but the Court did not go on that: the objection was not taken, nor did the argument proceed on it. If no satisfaction can be obtained for this, timber may be destroyed and mines opened on every estate, contrary to the intent of the makers of the settlement, and of every one entitled

under it, except the first owner of the inheritance, who may destroy the whole, or work the mines barely on consent of a common farmer for life, by collusion with him, or ex vi if he does not agree; an action for the loppings and shade could be only brought by the tenant, which it would be worth while to pay on a wooded estate. There are few estates in England which are not let for years; and the first owner of the inheritance (although his remainder is very remote) may, by joining with such tenant, strip the estate, for *trespass* or *waste* cannot be brought against him. This argument, ab inconvenienti, is the strongest at law as well as equity. As, therefore, the law allows these contingent limitations to be made and preserved, and most lands in the kingdom are so settled, and the intent of the parties is to preserve the timber as well as the rest, and as there is no legal remedy, this Court will find one, which will not be adequate if satisfaction is not made after the act is done. This therefore, is not a particular case, but a very general and universal one.

Second argument for the defendant.

For the Defendant was cited *Claxton* v. *Claxton*, 2 Vern. 152; *Aspinwall* v. *Leigh*, 2 Vern. 218; and that, if the parties were disabled from severing the timber, it might be kept too long on the estate, and rest in suspense for several years, to the detriment of the public.

Lord Chancellor Hardwicke took further time to consider of it: and Sir John Hind Cotton having died pending the suit, and the cause revived against his representatives, his Lordship gave judgment 5th February, 1753.

Lord Chancellor Hardwicke (*a*).—The end of the bill is, that defendant may account, and make satisfaction to the plaintiff, for all such sums of money as he hath received by a fall of timber upon the estate in question, in the year 1714, with interest.

(*a*) 1 Dick. 183. This case was copied from Lord *Hardwicke's* written argument.

The case is this: Richard Garth, Esq., being seized in fee, by will devised to Richard Bovey, father of the

plaintiff, for ninety-nine years, if he should so long live *without impeachment of waste, voluntary waste excepted*, on condition he took upon himself the surname of Garth; and from and after the forfeiture or determination of that estate, *to the use of trustees during the life of the said Richard Bovey, in trust to preserve contingent estates*, but, nevertheless, to permit the said Richard Bovey, at and after his full age of twenty-one years, to receive the rents, issues, and profits thereof during his life, with remainder to his first and other sons in tail male. After this there are remainders to Avery Garth and his sons in like manner (all which determined soon after the testator's death), with the ultimate remainder to Sir John Hind Cotton, the defendant's grandfather, in fee simple.

Of this will the testator made Catherine, his wife executrix.

On the 18th July, 1700, the testator died.

On his death the plaintiff's father entered upon the estate, and performed the condition of taking on himself the surname of Garth.

Sir John Hind Cotton, the defendant's grandfather, died, whereby the remainder in fee descended to the last Sir John Hind Cotton, his son and heir, and in whom the remainder of inheritance was become vested.

On the 12th February, 1713, the plaintiff's father executed a letter of attorney to Reginald Marriot authorising him to come to an agreement with Sir John Hind Cotton, the remainder-man in fee, for a fall of timber on the estate.

On the 16th of July, 1714, articles were entered into between the plaintiff's father, by Mr. Marriot his attorney, on the one part, and Sir John Hind Cotton, the defendant's father, on the other part, reciting that the plaintiff's father was seised for life (which is not true, for his estate was only for ninety-nine years, determinable on his life), with remainder to all his sons in tail male, with remainder to Sir John Hind Cotton in fee; that the plaintiff's father had then no issue male; that he had desired Sir John Hind Cotton to consent to the cutting down

and selling part of the timber then standing and growing upon the premises.

Upon these recitals it is agreed that some person authorised by the plaintiff's father, and some person authorised by Sir John Hind Cotton, should view, and mark what timber trees were then fit to be cut down; that then the parties should agree, and appoint by writing under their hands, how many of the trees so marked should be cut down, and sold for the best prices that could be got.

That Sir John Hind Cotton should not take any advantage of the cutting of the timber, nor should it be esteemed waste, nor any advantage taken thereof on pretence of its being waste.

The first trust of the money to arise by sale of the timber is, that it shall be applied to pay all such debts as were owing by the testator at his death, together with the legacies by him given, which have not been nor shall be paid out of the personal estate (although it is admitted, by the answer of the original defendant, Sir John Hind Cotton, the defendant's father, that the estate devised was not subject to the payment of the testator's debts); that the residue of the money arising by the sale of the timber should be divided into moieties between the plaintiff's father and the late Sir John Hind Cotton.

The articles then take notice, that there was a sum of 1787*l.* 5*s.* 6*d.* then in the hands of one of the Masters of this Court, being the produce of timber sold off the estate by Sir John Hind Cotton, the defendant's grandfather, which was claimed by both parties; and it is agreed that the money shall be paid out of Court, and applied to the same purposes as the money to arise by the timber then to be felled.

It is further agreed that the death of the plaintiff's father without issue male, or, his having issue male, on the death of Sir John Hind Cotton, should make no alteration in the terms thereby agreed on; but that the parties, their executors or administrators, should, notwithstanding any death or alteration, have the like share

and benefit of the wood and timber to be felled and cut down as if all such wood and timber had been felled and cut down, and the money divided and paid between the plaintiff's father and Sir John Hind Cotton, before such death or alteration.

Then follows a clause for applying the testator's personal estate, in the first place to the payment of his debts and legacies.

Sir John Hind Cotton, the original defendant, admits, by his first answer (which is not replied to), that he received about the sum of 1000*l.* for his share of the money for which the timber was sold.

At the time of entering into these articles, and when the timber was felled and disposed of, *the plaintiff was not born*, but his father was then married to Mary Pullen, his first wife; and it is sworn by the first answer, that he had been married to her for several years without having any issue, and was not then likely to have any by her.

In September, 1716, she died without ever having had any issue; and sometime after, the plaintiff's father intermarried with Elizabeth Emmerson.

On the 26th of May, 1724, the plaintiff was born, which was about ten years after entering into the articles.

On the 11th of January, 1727, the plaintiff's father died, leaving the plaintiff, his only son, an infant, who then became entitled to the estate as tenant in tail in possession.

On the 26th of May, 1745, the plaintiff attained his age of twenty-one years, and in Trinity term following suffered a recovery of the estate to the use of himself and his heirs.

On the 20th of May, 1748, the original bill was brought by the plaintiff against Sir John Hind Cotton, who dying before a determination, the suit hath been revived against the defendants, his executors, and the same relief is prayed out of his assets, and assets are admitted.

Upon this case the general question is, whether the plaintiff is entitled to satisfaction for so much as Sir John Hind Cotton, the father received out of the in-

heritance by the fall and sale of timber, before the plaintiff came in esse, and consequently before he had any estate in him in the land, and whilst the remainder, which vested in him afterwards, rested in mere contingency or possibility.

This hath been admitted at the Bar, on all sides, to be entirely a new question, upon which there is no precedent, and which hath never been brought into judgment before.

It hath been admitted, also, that the plaintiff can have no remedy at law, either in his own name or in the names of the trustees to preserve contingent remainders, but that his only possible remedy is in a court of equity.

This made it necessary for the Court to proceed with great deliberation before a decision was made, which would be the first precedent after the invention of trustees to preserve contingent remainders, now about a hundred years since, and which may have extensive consequences as to other cases that may arise.

In order to determine whether the plaintiff is entitled to the relief he prays, it will be necessary to take several matters into consideration—to lay down some that are plain, and to clear and establish others that appear more doubtful.

First, that the stripping of this estate of the timber was a wrongful act is clear from the nature of the limitations.

The *plaintiff's father was only tenant for years, punishable for wilful waste, and had no present right to or interest in the timber, other than the mast, and shade, and necessary botes.*

The defendant's father had no *present* right to cut it down, but in his turn, according to the order of limitation. It is true, the inheritance was vested in him, subject to open and let in the contingent remainder, when a son should come in esse; and in that quality the timber part of the inheritance was vested in him, but he had no present right to take and use it. The trustees, who were seised of the freehold, might have restrained him in

this court by injunction, and the plaintiff might have brought an action of trespass against him for his entry and tortious act.

Further, it was the duty of the plaintiff's father so to have done, not only in respect of the trespass upon himself, which he might have waived, but in respect of the privity which was in expectancy between the tenant for years and the contingent remainder-man, when he should come in esse; for between the tenant for years and the lessor, or the remainder-man of the inheritance, there is a privity; and before the statute of Quia emptores terrarum a tenure arose: and this makes a tenant for years a kind of fiduciary for the lessor, or the remainder-man, who stands in his place.

As this act was wrongful, both in Mr. Garth, the plaintiff's father, and the late Sir John Hind Cotton, so this wrong was committed collusively between them: when I say collusively, I do not mean an injurious intention, for they might mistake their right; but that will not vary the case in respect of the right of others. This appears by the whole frame of the articles, which are an agreement to do what neither of them alone, nor both together, had a right to do. In order to this, the plaintiff's father is recited to have the freehold, which he had not. A colour is given to the transaction, as if it were for payment of the debts of the father, to which it is admitted the estate was not liable; and it is expressly stipulated, that, even in case the plaintiff's father should die, leaving issue male, before all the timber should be felled and the money divided, the parties to these articles (i. e. the tenant for years, and the remote remainder-man,) should have the same shares as if all the timber had been felled and the money divided before such death or alteration had happened.

Can there be a stronger proof of collusion than this? The tenant for years enters into an agreement, not only contrary to his general privity and trust (if I may so speak), but both the parties bind themselves in plain terms to injure the remainder-man, even after his estate

should become vested, if that event should happen before this destruction was completed.

The *next* thing which is plain and self-evident is, that this wrongful collusive transaction hath turned to the damage and loss of the plaintiff.

The next inquiry is, whether the plaintiff is entitled to any remedy in this court upon the principles of equity.

At law, it is admitted, as I said before, that he can have none; and it must be admitted further, that, if the limitation to trustees to preserve contingent remainders had been out of the case, he would have had none in equity.

Indeed, as the plaintiff's father was made only tenant for years, if there had not been such a limitation to the trustees, all the contingent remainders would have been void, for want of an estate of freehold to support them; and Sir John Hind Cotton would have had the immediate freehold as well as the inheritance in him, which would have given him a clear right. But if the plaintiff's father had been tenant for life, and there had been no such limitation to the trustees, the plaintiff could even then have been entitled to no remedy, because his whole use in the land, whilst it remained in contingency, would have been in the power of the tenant for life to bar by fine, feoffment, or surrender to the remainder-man vested; and there could have been no pretence for this Court to interpose to preserve or restore to him part of that inheritance, the whole of which was in the power of the tenant for life.

Therefore, the stress and foundation of the *plaintiff's equity depends entirely upon the estate limited to the trustees to preserve the contingent uses*, and the consequences from thence.

In order to determine concerning the force and operation of this in the present case, I will consider—

First, what is the intention and use of creating limitations to trustees for preserving contingent remainders.

Secondly, what estate such trustees take in point of law, and what actions they may maintain at common law.

Thirdly, what is the nature and extent of this trust in

equity, and what remedy they may pursue in this Court.

Fourthly, how far, and in what cases, such trustees may be charged in equity for a breach of trust, or any other person be affected by their acts, or laches, in breach of their trust.

First, the intention of limitation to trustees to preserve contingent uses took its rise from the determination of two great cases, reported by Lord *Coke*, in his first volume—*Chudleigh's case* (*a*), Hil., 31 Eliz., and *Archer's case* (*b*), Mich., 39 Eliz. ; though it was several years after those resolutions before that light was struck out, and it was not brought into practice amongst conveyancers till the time of the usurpation, when, probably, the providing against forfeitures for what was then called treason and delinquency was an additional motive to it.

(*a*) 1 Co. 120, Poph. 70, and 1 And. 309, where it is best reported.

(*b*) 1 Co. 63.

Let us see, then, what were the claims and defects which wanted to be filled up and remedied in consequence of those two judgments.

The grand dispute in *Chudleigh's case* was concerning the power of feoffees to uses created since the Statute of Uses (27 Hen. 8, c. 10), to destroy contingent uses by fine or feoffment before the contingent use came into being.

In order to determine this, the judges entered into very refined and speculative reasonings, some of which (I speak it with reverence) are not very easy to comprehend.

They all agreed, that where there is a conveyance to uses, to the use of the father for life, remainder to his first and every other son in tail, with remainders over—in all those cases no estate at all is left in the feoffees, but the whole estate is divested and drawn out of them by the Statute of Uses.

But then came the question respecting the contingent uses to the sons not in esse. On the one side, though they admitted there was no estate left in the feoffees, yet they said there was a scintilla juris, a power of entry to preserve the contingent uses, if, by reason of disseisin or disturbance of the estate, there should be occasion; for, say they, no use can be executed by the statute unless

there be a person seised to the use, and also a cestui que use. And, if any disseisin or disturbance of the estate should happen, the right to the use cannot be executed within the statute: therefore, lest these contingent uses should be destroyed and not executed, there must, by construction of the statute, be such a power of entry left in the feoffees and their heirs.

This was the opinion of the greatest part of the judges.

Others of the judges were of opinion that there was not only no estate left in the feoffees, but no power or right to enter, nor anything to do with the land; but that they were at first only conduit-pipes, and the estate that was in them was by the statute wholly transferred to serve the uses which were in esse, with a pregnancy and prospect to the contingent remainders, if they should arise in their due time.

It must be observed, that one thing which weighed much with the majority of the judges, to be of opinion for leaving a right of entry in the feoffees to preserve the contingent uses, was their fear of perpetuities, and of having contingent estates by way of use in persons not in esse, if they should not be destroyable by the feoffees; for this doctrine, as it left it in the power of the feoffees to preserve the contingent uses, so it put it into their power to destroy them, if they pleased.

The reason of which was, that at that time the law was not settled that the destruction of the particular estate by the feoffment or conveyance of the cestui que use for life, before the contingent remainders became vested, was a destruction of the contingent remainders: but afterwards came *Archer's case*, in which case this point was solemnly settled, and they were relieved from their apprehensions; for, though *Archer's case* is placed in the reports before *Chudleigh's case*, it was not determined until some years afterwards.

The clearest summary of the reasoning in those cases is stated by Mr. Pollexfen, in his argument of the case of *Hales* v. *Risley*, in Pollexfen, 385, from whence I have taken it.

From this deduction you will see what were the chasms and defects to be supplied.

Here was, then, understood to be a power in the general feoffees to uses, either to preserve or destroy those uses ad libitum, and here was a power in the cestui que use for life to destroy them.

How were those defects to be supplied and filled up? By vesting a limitation in certain trustees eo nomine, upon an express trust to support them. But how to support them? By preserving the whole inheritance to come entire to the cestui que use in contingency, in like manner as trustees to uses ought to do before the Statute of Uses, when they were but trusts to be executed in this Court. And, as things then stood, such trustees, having the whole legal estate, might and ought to preserve the entire inheritance, whether consisting of the lands, mines, or timber, for the benefit of all the cestui que trusts in remainder, either vested or contingent.

Secondly. Consider, in the next place, what such trustees take in point of law, and what actions they may maintain at common law.

It hath formerly been attempted to be brought in question, whether, upon such a limitation to trustees, after a prior limitation for life, they took any estate at all in the land, or only a right of entry on the forfeiture or surrender of the first tenant for life, by reason that the limitation, being only during his life, could not commence or take effect after his death.

But this was soon settled on the authority of *Cholmondeley's case*, 2 Co. 50. a., where it was held, that, if there is a lease to A. for life, remainder to another during the life of A., this is a good remainder; for by possibility the remainder may take effect in case a tenant for life makes a feoffment in fee, or commits any other forfeiture; and so in the book, 41 Edw. 3, Fitzh., tit. "Waste," 83; and this is followed by the late case of *Duncomb* v. *Duncomb*, Hil., 7 Will. 3, C. B., 3 Lev. 437, which was one of the first cases wherein the operation of such

limitation to trustees to preserve contingent uses came into question.

If this be so upon such a limitation, after a prior estate for life, it holds much more strongly when limited after a prior estate for years only, determinable on the life of the first tenant: because in the last case it comes the first estate of freehold, to the trustees, as was rightly reasoned by Lord Chief Justice *Lee*, in the case of *Smith* v. *Dormer*, and *Packhurst*, Mich., 14 Geo. 2, B. R. (*a*).

(*a*) 8 Vin. Ab. 413; Willes' Rep. 327; 3 Atk. 135; 6 Bro. P. C. 351, Toml. ed.

It is plain, therefore, that these trustees had the immediate freehold in them—an estate pour autre vie; and at law they alone could maintain or defend any action concerning the freehold.

If a disseisin was committed they must bring the assize, and they must defend in all præcipes: for the possession of the tenant for years was, in law, their possession: for this reason they had in law an interest in the timber, not, indeed, to cut down or destroy, but in respect of the enjoyment by their tenant for years, and of the expectancy of its coming into their actual possession, by the determination of his estate, as part of their freehold.

Notwithstanding all this, it is certain that they could maintain no action of waste; the reason of which is, that the common law gave the prohibition of waste only to an owner of the inheritance, and the Statute of Gloucester gave the writ of waste to the same person. But in this respect such trustees are in no other condition than all other remainder-men for life.

Thirdly. Consider, in the next place, what is the nature and extent of their trust in equity, and what remedies they may pursue in this Court.

And I hold it to be agreeable to natural justice, and in support of right, to construe their trust in the most liberal manner. In the case of *Mansell* v. *Mansell* (*b*), (which must be more particularly mentioned by and by), it was expressly laid down by Lord *Raymond*, as I took it from his own mouth—"It is only positive law that tenant for life may destroy contingent remainders, and therefore it was a very considerable invention to create these trusts to

(*b*) 2 P. Wms. 678; Ca. t. Talb. 252.

preserve them; they are the creatures of the Court, and properly under its direction and control."

The first trust is declared to preserve the contingent estates thereinafter limited. How to preserve them? To preserve the inheritance as entire as possible—to go according to the succession established by the testator, which inheritance consists of the land, timber, and mines, and cannot be preserved entire without preserving all three. In many estates the timber is the most valuable part—in more, the mines; and the destruction of the one, or the exhaustion of the other, might take away, or be an alienation of, the best part of the inheritance.

But it hath been objected, that this relates only to the preservation of the legal estate of the use, and not to the timber or mines, because the estate of the trustees cannot support any action of waste.

This might, in many instances, be to preserve the shell without the kernel, and brings it to the question, what remedies they may, in virtue of this trust, pursue in this Court.

These trusts are equally declared to make entries and bring actions, as the case shall require. Here it is expressly to do all and every such lawful act and acts, by entry or otherwise, as shall be requisite for that purpose and end.

But whether the expression be the one or the other, it comes to the same thing, and comprehends all remedies both in law and equity.

For the course of equity is a part of the constitution of the law and judicial proceedings in this kingdom. Therefore, if, after a forfeiture committed, and an entry made for that forfeiture, such trustees wanted any assistance of a Court of equity in support of their trust, and not to break in upon the right of the tenant for life to receive the rents and profits, they might undoubtedly, by force of this trust, have their remedy here. As they may do this, I am clearly of opinion, that they may bring a bill for an injunction to stay waste, although no precedent in point is produced for it.

In the present case they were remainder-men pour autre vie, and immediately owners of the freehold in law. In the case of *Dayrell* v. *Champness*, 1 Eq. Ca. Ab. 400, Trin., 1700, a remainder-man for life was admitted to maintain such a bill without making the owner of the inheritance a party; and although it was observed upon that case by Mr. *Clarke*, that it appears by the state of it in the book that the plaintiff had the first remainder in tail vested, yet that doth not appear by the recitals of this decretal order; and if it had, the objection could not have been made.

If the trustees could do this as remainder-men of the legal estate pour autre vie, surely their trust, which affects their conscience, and, according to Lord *Raymond's* opinion, makes them creatures of this Court, would not make their case the weaker here.

But the books go further, and say a bill may be brought for an injunction to stay waste on behalf of an infant en ventre sa mère (*a*). And so is *Musgrave* v. *Parry*, 2 Vern. 710; which is liable to much more difficulty, for that must be as amicus curiæ on the unborn child's behalf.

(*a*) See *Lutterell's case*, cited Prec. Ch. 50; *Scatterwood* v. *Edge*, 1 Salk. 229.

I, therefore, hold most clearly, that the trustees might have brought such a bill, and obtained an injunction to stay this waste, both against the plaintiff's father and the late Sir John Hind Cotton.

Pursue this, then, into its necessary consequences.

Suppose, after such an injunction granted, the timber had been felled: this had been a contempt of the Court, and the contemnor must have stood committed.

Then arises the question which Mr. *Solicitor-General* (*b*) very properly put in his argument—on what terms should they be discharged? This Court could not have fined them: therefore, certainly, only on the terms of making satisfaction. That satisfaction could not have been made by setting up the trees again, and therefore it must have been by paying the value. Who must have had that value? Not the tenant for years, for he had no pretence to it; nor the remote remainder-man in fee, for

(*b*) *Murray*, afterwards Lord *Mansfield*.

he had no right to take it: and this would have been to reward them both for their contempt and collusion. The consequence is, it must have been laid up, and secured to attend the contingent uses. Without this, justice could not have been done.

Fourthly. It comes next to be considered, how far and in what cases such trustees may be charged in equity for a breach of trust, or any other person may be affected by their act, or laches, in breach of trust.

Notwithstanding the saying of Mr. *Pollexfen*, arguendo at the bar (Pollex. 250), "that trustees to preserve contingent remainders were never punished in equity when they broke their trust" (which, by the way, is a kind of contradiction in terms), that is now exploded, and settled to the satisfaction of mankind to be otherwise.

It was first broken in upon by Lord *Harcourt*, in the case of *Pye* v. *Gorges* (*a*), Mich., 1710, where he declared, that "when such trustees were appointed, whether by marriage settlement or will, and they, before the birth of a son, joined in a conveyance to destroy the contingent remainders, this was a plain breach of trust, and the persons taking under such a conveyance, if voluntary, or having notice, should be liable to the same trusts:" and he said, if there was no precedent in the case, he would make one.

(*a*) Prec. Ch. 308; 1 P. Wms. 128; 2 Salk. 680; 7 Bro. P. C. 221, Toml. ed.

Then came *Tipping* v. *Pigot* (*b*), in Mich., 1711, before the same Lord Chancellor, and he adhered to the same doctrine, and said it would be dangerous for such trustees themselves to make the experiment. Thus it stood till the great case of *Mansell* v. *Mansell*, which was first decreed by Sir *Joseph Jekyll*, at the Rolls, in January, 1731, and afterwards by Lord *King*, assisted by Lord *Raymond* and Lord Chief Baron *Reynolds*, Dec. 12, 1732 (*c*).

(*b*) 1 Eq. Ca. Ab. 385; Gilb. Eq. Rep. 34.

(*c*) 2 P. Wms. 687; Ca. t. Talb. 252; 2 Eq. Ca. Ab. 747.

Here it was first solemnly settled, by the concurrent opinion of all those great men, that the trustees themselves shall be liable in equity to make satisfaction for such a breach of trust; and also, that a voluntary alienee, or a purchaser for a valuable consideration, with notice of

the trust shall be decreed in equity to restore the estate; and in that case it was decreed accordingly.

Thus it stands determined, that for a breach of trust in aliening the inheritance the trustees are liable, and other persons are affected by their act done in breach of this trust.

On this I build: suppose these trustees had consented to the felling and sale of the timber—had joined with Mr. Garth and Sir John Hind Cotton in the articles, and expressly covenanted that they would bring no bill for an injunction—would the trustees in that case have been liable? Clearly so; for it was agreeing to alien part of the inheritance; and it plainly shows from the principle on which the Court founded itself in *Mansell* v. *Mansell*. Lord *Raymond* said, "It was strange in natural reason to say, that, where a man hath created a trust to preserve his estate, the trustees may break that trust, and give away the estate with impunity; and that there wanted no particular precedent for it, because it is founded on all the general rules of trust."

If the trustees had joined in the articles thus to break their trust, would Mr. Garth, the father, or the late Sir John Hind Cotton, have been affected by this express act, done in breach of their trust? This, to me, is also as clear; for then they would have had notice of this breach of trust, and have reaped the benefits of it; which is expressly within the rules of *Mansell* v. *Mansell*. And here I cannot help repeating some remarkable words of Lord *King*, who was not disposed to amplify the jurisdiction of this Court. "If it is," said his Lordship, "a breach of trust, and the trustees convey the estate over, a Court of equity is not to sit still and let others profit by the spoil."

This position is very apposite to the present case; all the difference is, that here is no positive act of the trustees, but only laches or neglect in not performing their trust, and bringing a bill for an injunction to stop this waste.

This may excuse the trustees, if they had no notice of the scheme or attempt to strip the estate of the timber;

but how will it excuse the others, who, as Lord *King* expressed it, have profited by the spoil? By no means.

In all cases of alienation the alienees are not affected merely by act of the trustees, but by notice of the trust: and here all parties had actual notice of the will, claim under it, and have expressly recited it in their articles. Therefore, in this case the actual notice of the trust operates to make the laches of the trustees affect them as much as their express act would have done in the other: and it would be strange to say that the plaintiff's and defendant's father would have been liable for the timber if the trustees had concurred in the destruction and sale of it, but shall be in a better condition because they did not. What is the justice that results from hence, but restitution? Just as in the case of an alienation with notice, the justice would have been a re-conveyance: indeed, it plainly follows by analogy from thence. Suppose an estate with valuable mines in it, unopened, settled in this manner, and the trustees to preserve contingent remainders had joined in an alienation, with notice. Afterwards such a purchaser, with notice, opens the mines, and exhausts them, putting a great sum of money into his pocket. Then a son is born, who is tenant in tail: the tenant for life dies, and the son brings a bill for a re-conveyance: if, according to the authority of *Mansell* v. *Mansell*, the Court had decreed a re-conveyance, would the justice have been complete without decreeing satisfaction for so much of the inheritance as was carried off by exhausting the mines? Clearly not. It would be a necessary, unavoidable consequence of equity, that satisfaction must be made to the owner of the inheritance. And yet this is liable to the same objections as have been made in the present case at the Bar. It was done at a time when the contingent remainder-man had neither jus in re nor jus ad rem, before he was in rerum naturâ; and no wrong can be done to a person non-existent. But these are colourable objections only: for, if equity ought to wait, and expect the vesting of the estate for his

benefit, and restore him that estate, it ought to do it completely.

I have chosen to go through the general reasoning (which hath, upon the maturest consideration, convinced me that the plaintiff ought to be relieved in this Court), before I state the objections made on the part of the defendant, the rather because the clearest answer to these objections will arise from the right application of that reasoning.

First objection.—That the interposition and allowance of trustees to preserve contingent remainders was not intended, nor has been suffered, to alter the legal rights of the tenants for life and the first remainder-man of the inheritance vested, either in respect of the timber or other property of, or powers over, the estate.

Answer.—This objection assumes too much; for I have already proved, and it is demonstrable, that the very intention of interposing this new-invented limitation was to alter and abridge the legal rights both of the tenant for life and the first remainder-man vested, to abridge the legal right of the former to defeat and destroy the contingent use of the inheritance whilst it remains contingent and eventual, to abridge the legal right of the latter, to destroy it by accepting a surrender of the estate for life: all which are as much legal powers as the cutting down of timber or the opening or digging of mines.

I admit the instance which was put, that if (where there is tenant for life or for years, subject to waste) timber is blown down by accident, or cut down by the tort of a stranger or of the tenant for life alone, the owner of the first remainder of inheritance vested shall have the benefit of it. So was the case of the timber blown down on the late Duke of Newcastle's estate, and the case of *Whitfield* v. *Bewit*, 2 P. Wms. 240 (*a*); but the ascertaining of the ground of these resolutions is sufficient to distinguish them from the present case.

(*a*) 2 Eq. Ca. Ab. 589.

The common law doth not, nor can, consider the contingent uses as having existence till they happen: therefore, according to *Lewis Bowles's case*, 11 Co. 79, and *Udal* v.

Udal, Aleyn, 81, an estate in contingency is as no estate till the contingency happens. And when the trees are severed the property must vest immediately in somebody, and that can only be in the first remainder-man of inheritance vested; and on the foundation of that property he may maintain trover for them.

This is his right at law; and there is in the cases put of trees fallen by accident, or merely by the wrongful act of a stranger or of the tenant for life, no ground of equity to take it from him.

But here comes in the force and operation of *the collusion* in this case. The destruction being made *by contrivance and collusion with the remainder-man, and affecting his conscience*, obliges this Court to pursue its known maxims in laying hold of it either by restraining the act before it be completed, or decreeing satisfaction for it afterwards: for, *in all cases where a legal right is acquired or exercised by fraud or collusion, contrary to conscience, it is the office of this Court to enjoin it, or decree a compensation*.

Second objection.—That the relief sought by the bill is contrary to all the rules of law, which allows no remedy for waste to any person who hath not an immediate reversion or remainder of inheritance vested at the time of the waste committed.

Answer.—This is true in general, though it admits of some exceptions even at common law. But, if it were true at common law in the latitude with which it was laid down, it would not govern this case, which depends *upon principles of equity arising from the collusion and covin between the tenant for years and the remote remainder-man*, which is an established ground of relief in this Court, even beyond, and sometimes contrary to, the rules of law.

However, as I always incline to adhere, as near as justice will admit, to the rule *equitas sequitur legem*, I will endeavour to show how far the opinion I have given coincides with, and is supported by, the reason of some cases concerning waste.

It is clear, that when there is a tenant for life (*a*), with remainder over in fee or tail, and tenant for life commits waste, the remainder-man in fee, or in tail, can have no action of waste. The reason is, because the plaintiff in the action must recover the place wasted, and that would be an injustice to the remainder for life, which is not forfeited; and, if it should be recovered by the owner of the inheritance (being under a limitation of the party) it would never go back again.

(*a*) [With remainder to another tenant for life]. Evidently omitted.

But, notwithstanding that, he may have another action of trover for the trees, and therein recover satisfaction for the wrong done to the inheritance; nay, in case the remainder-man for life dies, living the remainder-man of the inheritance, he may then bring an action of waste for the waste done during the continuance of the remainder for life.

Further, if there be a tenant for life, with an immediate remainder, or reversion in fee, and the remainder-man, or reversioner in fee, grants over his remainder, or reversion, to A. for the life of A.; then the tenant for life commits waste, and afterwards, the grantor (*b*) of the remainder, or reversion for life, dies, this remainder-man, or reversioner in fee, may maintain an action of waste, though he had parted with his remainder, or reversion for that time, by his own voluntary act.

(*b*) Query grantee.

All this appears by *Paget's case*, 5 Co. 76, b., and the case of *Udal* v. *Udal;* and I shall make a further use of it by and by.

But such is the abhorrence of the common law to waste and destruction, that it hath extended its remedies, in some special cases, beyond the strict principles on which they were originally founded; and, therefore, though it be requisite in general, that the inheritance should be vested in the plaintiff at the time of the waste done, else he cannot lay it to his disherison; yet, if the estate were out of him by wrong, and then come into him again, he shall maintain the action of waste. Thus, if lessee for life make a feoffment in fee upon condition, the feoffee does waste, and afterwards breaks the condition, and the

lessee for life enters for the breach, though the reversioner had nothing in the reversion at the time of the waste done: yet, as it was out of him by tort, when it is revested, he shall have this remedy. Co. Litt. 356, a.

But there is another case at law, the reason of which seems to me to be more analogous to the present case; as that of a bishop, after the restitution of temporalities to him and his successors, in right of his church. When he dies, during the vacancy the right is in the king; and when a new bishop is invested with the temporalities, the fee is in him. Suppose, then, a tenant for life, or for years, by demise of the predecessor, commits waste during the vacancy, the successor shall have the action for this waste, though he had nothing at all in the land at the time the waste was done. Co. Litt. 356; Fitzh. N. B. 112.

I shall be told, perhaps, that that is by particular statute, and therefore is no proof of the reason of the common law; and that the Statute of Marlebridge, Cap. 29, against depredations upon the possessions of ecclesiastical persons, gave this remedy; and for this some countenance may be drawn from what Fitzherbert says, in the place cited.

But I beg leave to deny this to be law, and to hold, that that statute doth not include bishops or their possessions; and of this opinion is Lord *Coke*, in his reading on the Statute of Marlebridge (52 Hen. 3), 2 Inst. 151. His words are, "This Act extendeth only to abbots, priors, and other prelates, that be religious and regular, and not to bishops and other ecclesiastical persons, being secular; for in the second clause of this Act, hujus modi religiosorum is mentioned for the distinction between religious and secular; and the reason of this diversity is, that the abbots and priors, and other religious persons, are dead persons in law, and have capacity to have lands and goods only for the use and benefit of the house, and cannot make any testament; and therefore, the church, or religious house, is holden always one; in respect whereof, the succeeding abbot shall have an assize for disseisin done in the lifetime of his predecessor, and an action of waste

for waste done in his predecessor's time; but so shall not a bishop, dean, archdeacon, or the like, who are ecclesiastical persons secular, because the church, by their death, hath an alteration, and is not always one."

That the opinion of Lord *Coke* was, that the action is not founded on the Statute of Marlebridge (52 Hen. 3), is clear by other cases; for if bishops were within the statute, then they as well as abbots might have an action of waste for waste done, not in time of vacancy, but in their predecessors' time, which, as to ecclesiastical persons regular, is clearly within the statute; but it hath been settled that they cannot: 39 Edw. 3, 15; 2 Hen. 4, 2; 2 Roll. Abr. 8, 24; Pla. 3, 4, 5, 6, 7. From hence I infer, that this remedy was given, not by particular statute, but by the policy of the law which would not permit an estate, which it allowed to be created, and whilst it was in gremio legis, as it were, to be destroyed or stript without giving a remedy to punish it, though by an extension of its common principles.

But still I must resort back to this, that if there was not so much countenance from the reason of some cases at the common law for this opinion, yet that would not govern this case, which depends on principles of equity; and equity hath always gone further to restrain waste and destruction than the common law hath done.

Therefore, in the case already put, of an intermediate remainder for life, though the law allows no action of waste, this Court sustains a bill for an injunction, and this ab antiquo, according to the case in Moore, 554; where Lord *Ellesmere* says, he had seen a precedent for it so long ago as in the reign of Richard II., 1 Roll. Abr. 377; 1 Vern. 23 (*a*), and many cases in practice.

(*a*) *Tracy* v. *Tracy*.

And although the tenant in tail, after possibility of issue extinct, is at law dispunishable for waste by reason of the inheritance, which was once in him, yet Lord Chancellor *Nottingham* was clearly of opinion, to grant an injunction to restrain a tenant in tail from committing waste in timber, which grew for the ornament of a mansion-house: *Abrahall* v. *Bubb*, 2 Freem. 53; 2 Sho. 69 (*b*). In the same book there is the like case, before

(*b*) S. C. 2 Eq. Ca. Ab. 757.

Sir *John Trevor*, M. R., 2 Freem. 278, Hil. 1704; and this hath been followed since, by several cases of tenant for life *without impeachment of waste generally*, who have attempted to pull down a mansion-house, or to cut down timber growing for shelter or ornament of the mansion-house.

But this Court hath gone still further: and in the case of *Abrahall* v. *Bubb*, Lord *Nottingham* cites the case of a Lady Evelin, where there was tenant for life, remainder to the first son for life without impeachment of waste, with remainders over; and the first son, by leave of the lessee of the tenant for life, came upon the land and felled timber, which was not under the description of trees growing for shelter or ornament; and this Court granted an injunction against him, though no action whatsoever could be maintained at law: and upon the same ground, I did the like in the case of *Fleming* against the late *Bishop of Carlisle and others*. There the bishop was tenant for life, remainder to his eldest son for life, *without impeachment of waste*, with remainder over in fee; the eldest son, by permission of the bishop, entered and began to cut down the timber, and the reversioner in fee brought a bill for an injunction, and I granted it, because he was not to be allowed to exercise his power of doing waste by anticipation, and before the estate to which this privilege was annexed came into possession; and this in reason comes near to the case of the late Sir John Hind Cotton's bringing himself, by collusion, into possession of the timber before his time.

(*a*) 3 Atk. 209; 2 Eq. Ca. Ab. 523.

The case of *Robinson* v. *Litton* (*a*) went still further than the common law: that cause was heard in this Court, the 12th December, 1744. There was a devise to the defendant and his heirs; and if he should die before the age of twenty-one years, leaving no issue, then to the testator's first &c. daughter in tail, remainder to the testator's own right heirs; but if the defendant should live to attain the age of twenty-one years, then the estate should be sold, and the money be applied for the benefit of the testator's daughters. The defendant, being under the age

of twenty-one years, began to commit waste, and the daughters brought their bill in this case; and though the defendant had the inheritance in him in point of law at the time, yet by reason of the contingent executory limitation, the Court granted an injunction, and at the hearing of the cause, after its being fully argued, made that injunction perpetual.

Third objection.—That, suppose a bill might have been maintained by the trustees to support the contingent remainders, to stay this waste before it was committed, yet it will not follow from thence, that after that is over, a bill may now be brought for an account, and that the jurisdiction of this Court to decree an account of the value of the timber, is only incident and concomitant to the jurisdiction of granting an injunction.

Answer.—It is true that the general run of the cases is of bills for an injunction, because that is a preventive suit, and the most remedial to the party; but that affords no conclusive argument that a bill for such an account cannot be maintained without praying an injunction.

In support of this notion, only one case was cited—*Jesus College* v. *Bloome* (*a*), which was before me November 13, 1745. The lessee of the college had, during his lease, cut down some trees, and taken away some stones and materials of the premises, and converted them to his own use; the term was expired, and a new lease granted to a stranger, and the college brought their bill for an account and satisfaction of the waste. At the hearing of the cause, I doubted (amongst other things) whether such a bill in equity was maintainable, without praying an injunction to stay the waste, and it stood over to another day, to produce precedents; none were produced, and the bill was dismissed, without costs; but the point was not absolutely determined, nor was that the only ground of the dismission: but I was of opinion, that, at the utmost, it was in the discretion of the Court, and if the college had a right, they might clearly bring an action of trover at common law; and it being a matter of small value, I did not think fit to countenance such bills in this Court,

(*a*) 3 Atk. 262; Amb. 54, where the reports of the case differ from the account of it given here by Lord *Hardwicke*, and the bill was, it seems, dismissed, with costs.

after the lease expired. This is widely different from the present case in all its circumstances, and particularly that it is admitted, that *the plaintiff here, though greatly damnified, can have no remedy at law,* which is a substantial difference.

Fourth objection.—But it was objected further, that if such a bill for an account, not incident to an injunction, can be maintained, yet there is no precedent of decreeing the value of the timber to be secured and laid out in land for the benefit of the contingent remainder-man; and this could not be done, even upon a bill by trustees to preserve contingent remainders before the waste completed; and for this the case of *Whitfield* v. *Bewit* (*a*) was relied on.

(*a*) 2 P. Wms. 240.

Answer.—This objection hath been already answered in the course of my argument, and to that I will refer without repeating it. The sound distinction between this case and that of *Whitfield* v. *Bewit* is, *the collusion and covin between the tenant for years and the remote remainder-man in fee;* whereas, in that case, the remainder-man in fee was entirely innocent, and had done nothing contrary to conscience to come at his legal property in the timber when severed: but it was solely the tortious act of the tenant for life; and I think I have proved that in some cases of destruction of contingent remainders, or alienations of part of the inheritance, to the prejudice of the contingent remainder-man, such an account and compensation must be decreed, in order to attain adequate justice.

On this I rely for an answer to that objection.

Fifth objection.—That the demand is made after a great length of time, and that ought to be allowed as a bar in this Court.

Answer.—But though there is length of time in the case, no statute of limitations stands in the way, nor is there any laches to be imputed to the plaintiff.

It is true the articles were entered into in 1714, and the timber was felled soon after; but the plaintiff was not born till May, 1724; his father lived till 1727, and

he did not attain his age of twenty-one years till May, 1745; and this bill was brought in May, 1748, within three years after his coming of age.

As to the inconvenience objected to arise from this length of time, how is that inconvenience greater than the common law's allowing an action of waste to be brought by a remainder-man in fee, after the death of a mesne remainder-man for life, for waste done in his life-time? That life may have lasted forty, fifty, or sixty years afterwards, and yet this the law allows. Besides, in this case the plaintiff submits to accept the value on the foot of the defendant's answer, which avoids the difficulty of an account.

Sixth objection.—Another objection hath occurred to me in considering this case, which was not mentioned at the bar, and that is, that by suffering a recovery in 1745, the plaintiff hath altered the state of the remainder, which was in him by the will, and gained a new use; that this might have been a bar to a proper action of waste at law, for waste done precedent; and, by parity of reason, ought to take away his remedy in this Court.

Answer.—This objection, though it may strike at first, yet receives a clear answer.

I admit that in Co. Litt. 53 b., Lord *Coke* lays it down, that, after waste done, there is a special regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for, if after the waste done, the reversioner granteth it over, though he taketh back the whole estate, yet is the waste dispunishable. So, if A. grant the reversion to the use of himself and his wife, and of his heirs, yet the waste is dispunishable; and so of the like, because the estate of the reversion continueth not, but is altered: and, consequently, the action of waste, for waste done before, which consists in privity, is gone.

This is undoubtedly law; but the difference is, here is no use or new estate created. The use of this recovery is declared only to the plaintiff himself and his heirs, whereby his estate tail is turned into an estate in fee,

which, in Lord *Derwentwater's Case*, before the judges and delegates, Hil., 6 Geo. 1, was solemnly determined to be the same use, and the same fee, only delivered from the fetters and restraint laid upon it by the Statute de Donis; and this was agreeable to the resolution of the case of *Abbot* v. *Burton*, 2 Salk. 590 (*a*), Trin., 7 Anne, C. B., and to the case of *Martin* ex. dem. *Tregonwell* v. *Strachan*, adjudged in B. R., Hil., 16 Geo. 2, and affirmed in the House of Lords in February, 1743 (*b*).

(*a*) 11 Mod. 181; Com. Rep. 160.

(*b*) 2 Stra. 1179; 4 Bro. P. C. 486.

But I go further still, and hold that, even in cases where the state of the reversion would be so altered by the act of the reversioner as to preclude his proper action of waste, yet still his property, in the timber severed before, would remain, and he might maintain trover for it, which is sufficient to take off the force of this objection as applied to the present case.

Seventh objection.—I shall mention but one objection more, and that arises recently from the present state of the cause, as it comes before the Court upon a bill of revivor against the representative of Sir John Hind Cotton, the original defendant: that an action of waste dies with the person; and, if the plaintiff had in other respects been in a condition to maintain waste against Sir John Hind Cotton, the party to the articles, it had been gone by his death; that the law is the same as to the action of trover, pari ratione he hath lost his equitable remedy for the waste.

Answer.—I admit the law to be clear, that an action of waste dies with the person; and I also admit, that I cannot find any authority or precedent for maintaining an action of trover against an executor upon a conversion by the testator in his lifetime: though, as to this point, I give no opinion; for thus much is certain, that an action of trover will lie for an executor, upon a conversion by the defendant in the lifetime of the plaintiff's testator, for which there are many authorities; and it seems difficult to be reconciled to reason and justice, that these remedies should not be mutual, even at the common law.

However, I will admit, for argument's sake, that the

action of trover for the timber was, as well as the strict action of waste would have been, gone, at the common law; but, notwithstanding that, I am of opinion that the plaintiff is entitled to the same relief in this court.

There have been several determinations in this court, where, by force of the rule, *actio personalis moritur cum personâ*, the remedy at law hath been extinguished (*a*): yet equity hath given the like satisfaction.

(*a*) See now 3 & 4 Wm. 4, c. 42, s. 2.

It is well known that, at common law, before the statute of 30 Car. 2, c. 7 (*b*), and 4 & 5 Will. & Mary, c. 24, s. 12 (*c*), no action or remedy could be had against the executor of an executor for a devastavit committed by the first executor of the goods of the original testator. But, notwithstanding this, equity did not scruple to get the better of this artificial maxim, and decreed an account and satisfaction against the representatives of such a wasting executor out of his assets.

(*b*) Rep. in part, Stat. Law Rev. Act, 1863.

(*c*) Rep. Stat. Law Rev. Act, 1867.

This is laid down as a rule in equity by Lord Chancellor *Nottingham*, in the case of *Price* v. *Morgan*, 2 Ch. Cas., fol. 215. His words are, "Although by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong, it is otherwise here, and the common law will come to it at last; and, therefore, whatever estate of the wasting executor is come to his representative, which his testator wasted, the personal estate of such wasting executor, in the hands of his executor, shall answer."

When Lord *Nottingham* said the common law would come to it at last, he was a true prophet; for this case was decided in the 28th of Car. 2, and the law was altered by Act of Parliament in the 30th of Car. 2.

In 1 Ch. Cas. 121, *Eton College* v. *Beauchamp and Biggs* (*d*), the provost and fellows of Eton were possessed of a rent or pension of 1*l.* 14*s.* per annum, granted by King Henry VI. to that college, issuing out of the lands. The defendant, Biggs, was executor of the tenant, and the bill was brought for a satisfaction of the arrears of rent incurred in his testator's lifetime, and suggested that the college did not know the lands out of which the rents were issu-

(*d*) *S. C.* 1 Eq. Ca. Ab. 32.

able, and so could not distrain; and, though the person of the terre-tenant was not chargeable with the rent at law, but only the land by way of distress; yet, forasmuch as the testatrix held the land, and did not pay the rent, it was said, that thereby the testatrix's personal estate was augmented, and therefore the Master of the Rolls, Sir *Harbottle Grimstone*, decreed the executor to pay the arrears, as far as he had assets of the testatrix.

In 2 Mod. 293, *Anon. Error*, Hil., 29 Car. 2, in the Exchequer Chamber, before the Lord Chancellor and Lord Treasurer, assisted by the two Chief Justices, the case was, the plaintiff had declared against the defendant as executor of Edward Nicholls, who was executor of the debtor. The defendant pleaded, that the said debtor died intestate, and administration of his goods was granted to a stranger, absque hoc that Edward Nicholls was ever executor; but did not say by his plea, "or ever administered as executor;" for, in truth, he was executor de son tort. The plaintiff replied, that before the administration granted to the stranger, Edward Nicholls possessed himself of divers goods of the debtor, and made the defendant executor, and died; and to this application the defendant demurred. Judgment was given for the plaintiff, in the Court of Exchequer, but reversed in the Exchequer Chamber; for an executor of an executor de son tort is not liable at law; though the Lord Chancellor *Nottingham* said he would help the plaintiff in equity.

These authorities would be sufficient to establish the point I am now upon. But I go further, and hold, *that in all cases of fraud the remedy does not die with the person;* but the same relief shall be had against an executor out of the assets of his testator, as ought to have been given against the testator himself. For, as *equity disclaims the maxim, that a personal remedy dies with the person whenever the remedy is proper for that jurisdiction*, this Court will follow the estate of the party liable to that demand, and out of that decree satisfaction. Now, collusion between two persons, to the prejudice and loss of a third, is, in the eye of the Court, the same as a fraud;

and, you have observed, that one principal ground of the judgment of the Court in this case is collusion appearing upon the face of the articles set forth in the answer.

I have now gone through the arguments and objections arising upon the particular case, and the authorities of law and equity.

One general argument remains, of which the counsel on both sides did in their turns endeavour to avail themselves—I mean the argument ab inconvenienti, which undoubtedly is of weight, especially in a new case.

On the side of the defendants were urged the inconveniences that would arise from making such a precedent, which would tend to lock up the timber of the kingdom from coming to market; would create questions between possessors of estates and contingent remainder-men, springing up at a great length of time; and there would be no knowing where to stop.

But let these inconveniences be compared with the inconveniences that must follow, on the other hand, from laying it down that a contingent remainder-man cannot possibly have any remedy in such a case—I say, let them be compared, and the former will weigh nothing, in the opposite scale, against the latter.

Thus far the law allows settlements of estates to go, and no further; and it hath been found to be a convenient medium between perpetuities and too flux and unstable a condition of things. Most of the family estates in this kingdom are under such settlements; and it frequently happens that the first remainder-man of the inheritance vested is a remote relation—remote in blood, and remote in the prospect of succession, perhaps after fifty years' contingent limitation of that inheritance.

If what has been done in this case should be determined to be done impunè, without any possible recompense in a court of equity, what havock would it make, and what a licence would be proclaimed! Every remainder-man in fee, though after ever so many contingent limitations, might, by collusion with the tenant for life, or years in possession, or perhaps of his under-tenant,

strip the estate, and convert the value of it to their own use. Suppose an estate in the great timber counties of England, in the north, or in Cornwall, where the principal value may consist in timber or mines, all that value may be exhausted and dissipated before a first son is born; and when he is born, he may find nothing but the shell of what was intended for a lasting support of a family of honour.

It will be no answer to this, to say the trustees to preserve contingent remainders may bring a bill for an injunction to stop this mischief; the mischief may be completely executed before they know of it, nay, possibly before they can know whether they are trustees or not; for it most frequently happens, that trustees to preserve contingent uses are inserted in settlements and wills without their being made acquainted with it.

From hence it is evident that this will be but a shadow of a remedy, unless the Court goes further, and builds a more adequate relief upon the same principles.

And here I cannot help adding, that this becomes of the greater importance, from the practice and abuses of the times into which we are fallen, when so many new inventions and contrivances daily show themselves in courts of justice, to supply or to tempt, or to impose upon the extravagance and necessities of tenants for life, to the destruction of their families.

These considerations bring to my mind the last reasoning of the judges in *Fermor's case*, 3 Co. 79, a; and with that I will conclude.

That resolution was quite new, and of the first impression, and was contrary to the letter of the Statute of Fines (4th Hen. 7, c. 24); but the book says—"Lastly, the judges in this resolution did greatly respect the general mischief which would ensue if such fines, levied by practice and covin of persons who had particular interests, should bar those who had the inheritance" (*a*).

(*a*) See 3 Co. 79, a.

The result of the whole is, I must decree satisfaction to the plaintiff for what the late Sir John Hind Cotton received out of his assets; and if the original limitations

had been still subsisting, I must have directed this money to have been laid out in the lands to the same uses; but as these are now barred, and the plaintiff is tenant in fee, the money is his own.

In this, the question of interest is material, and I have considered it: the principal money is reckoned by the answer at 1000*l.*; the cause being heard on bill and answer, and the plaintiff having at the bar prayed interest from the time it was received, in respect of the possible growth of timber.

But there being no proof, it does not appear what was the condition of the timber; whether, by the time the plaintiff's father died, in 1727, it might not have been decayed, and of little value; what might have been exhausted in repairs, or destroyed by tempests or accidents; or what young timber may have grown up in its place in the meantime; from these considerations, and as this is a new case, I do not think fit to give interest further back than the filing of the bill.

"His Lordship declared, that, on all the circumstances of the case, the plaintiff is entitled to recover satisfaction in this court for so much value of his inheritance as the defendant's testator exhausted and received by virtue or colour of the articles entered into between him and the plaintiff's late father, who was tenant only for the term of ninety-nine years, if he should so long live; and ordered that the Master, to whom he referred it, should compute interest on the sum of 1000*l.*, admitted by the answer of Sir John Hind Cotton, deceased, to have been received by him, from the time of filing the plaintiff's bill, after the rate of four per cent. per annum, and tax the plaintiff his costs; and that what shall be so found due to the plaintiff for the 1000*l.*, interest and costs, be considered as a demand by simple contract on the estate of Sir John Hind Cotton, deceased, and be answered and paid to the plaintiff, by the defendants, the executors, they having admitted assets of their testator, Sir John Hind Cotton, by their answer to the bill of revivor."

Decree taken from 3 Atk. 758; Reg. Lib. 1752, A., fol. 240.

Garth v. *Cotton* (the judgment in which is said by Lord *St. Leonards*, in his learned work upon Powers, to be one of the ablest ever delivered) is here given complete, the statement of the case and the arguments having been taken from 1 Ves. 524, 546; the judgment from 1 Dick. 183, where it is stated to have been copied from Lord *Hardwicke's* MS.; and the decree from 3 Atk. 758.

Under the devise, in *Garth* v. *Cotton*, to the plaintiff's father, for ninety-nine years, if he should so long live, *without impeachment of waste, voluntary waste excepted*, Lord *Hardwicke* considered him as punishable for *wilful waste*, and that he had no present right to or interest in the timber, other than the mast, and shade, and necessary botes, the exception of "voluntary waste" rendering the preceding part of the clause, "without impeachment of waste" (which, standing alone, would have conferred upon him the power of felling the timber), of no effect. See also *Higginbotham* v. *Hawkins*, 7 L. R. Ch. App. 676.

See the remarks upon *Garth* v. *Cotton*, in the case of *Vincent* v. *Spicer*, 22 Beav. 380, where Sir *John Romilly*, M. R., terms it "a very strong case" (p. 385). The facts there were briefly as follow:—Sir F. Vincent, on his marriage, settled his estate on himself for life, "without impeachment for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses or buildings to go to decay, and in not repairing the same." It was held by his Honor, that Sir. F. Vincent was entitled to cut all such timber (except ornamental), as the owner of the estate in fee simple, having due regard to his present interest and to the permanent advantage of his estate, might properly cut, in a due course of management.

A direction that a lessee of mines is "not to be dispunishable with waste" will be rejected as repugnant to a power to let an estate with "the mines and minerals:" *Daly* v. *Beckett*, 24 Beav. 114.

The very great importance of the limitation to trustees to preserve contingent remainders, the history of which is so admirably given by Lord *Hardwicke*, is well illustrated in *Garth* v. *Cotton*; for, as the plaintiff's father was only tenant for years, if there had been no such limitation, all the contingent remainders would have been void, for want of an estate of freehold to support them; and Sir John Hind Cotton would have had the immediate freehold, as well as the inheritance in him, which would have given him a clear right to commit waste.

If the plaintiff's father had been tenant for life, and there had been no such limitation to the trustees, the plaintiff could, even then, have been entitled to no remedy, because his whole use in the land,

whilst it remained in contingency, would have been in the power of the tenant for life to bar by fine, feoffment, or surrender to the remainder-man vested; and there could have been no pretence for the Court to interpose, to preserve or restore to him part of that inheritance, the whole of which was in the power of the tenant for life.

The foundation of the plaintiff's equity depended entirely upon the estate limited to the trustees to preserve contingent remainders; it was their duty to preserve the inheritance, consisting of the land, timber, and mines, entire. The trustees might have brought a bill to stay waste against the act of the plaintiff's father and the remainder-man; and Lord *Hardwicke* expressly decided, that their neglect or ignorance of their duty should not prejudice the tenant in tail not in esse at the time when the waste was committed.

It was, indeed, admitted by Lord *Hardwicke*, that where there is tenant for life, or for years, subject to waste, if timber is blown down by accident, or cut down by the tort of a stranger, or of the tenant for life alone, the owner of the first remainder of inheritance vested should have the benefit of it; because, he observes, "The common law doth not, nor can, consider the contingent uses as having existence till they happen: therefore, according to *Lewis Bowles's Case*, 11 Co. 79, and *Udal* v. *Udal*, Aleyn, 81, an estate in contingency is as no estate till the contingency happens. And when the trees are severed, the property must vest immediately in somebody, and that can only be in the first remainder-man of inheritance vested; and on the foundation of that property, he may maintain trover for them. This is his right at law; and there is in the cases put of trees fallen by accident, or merely by the wrongful act of a stranger, or of the tenant for life, no ground of equity to take it from him." See *Whitfield* v. *Bewit*, 2 P. Wms. 240, and *Duke of Newcastle* v. *Vane*, there cited.

In *Garth* v. *Cotton*, the timber was not blown down by accident, or cut by the tort of a stranger, or of a tenant for life alone, but was felled by the tenant for years and remote remainder-man, *in collusion together*, who, although at law entitled to the proceeds arising from the sale, were in equity (which has always interfered in matters of waste more extensively than courts of law) held accountable to the tenant in tail not then in esse, because they had collusively committed an act which greatly damnified him, and for which he had no remedy at law. The same result would have followed had Garth been tenant for life instead of tenant for years.

Upon the same principle, where there was a limitation in a settlement to A. for life, remainder to trustees to preserve contingent

remainders, remainder to his first and other sons in tail, remainder to B. for life, remainder to his first and other sons in tail, with reversion in fee to A., A. cut down timber; but Lord *Hardwicke*, upon a bill being filed by B., the second tenant for life, granted an injunction, observing, that the trustees to preserve contingent remainders might have brought a bill against the defendant to stay waste, for the benefit of the contingent remainders; and that the plaintiff could do so, because, though he had no right to the timber, yet if the defendant, the first tenant for life, should die without issue, he would have an interest in the mast and shade of the timber: *Perrot* v. *Perrot*, 3 Atk. 94; *Davies* v. *Leo*, 6 Ves. 784; *Birch-Wolfe* v. *Birch*, 9 L. R. Eq. 683.

By the Real Property Amendment Act (8 & 9 Vict. c. 106), s. 8, it is enacted, "that a contingent remainder, existing at any time after the 31st day of December, 1844, shall be, and if created before the passing of the Act, shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of *any preceding estate of freehold*, in the same manner, in all respects, as if such determination had not happened." Suppose, in a case coming within the Act, the limitation to trustees to support contingent remainders is omitted, could either a tenant for years, or a tenant for life, with the person in whom the first remainder of the inheritance is vested, cut the timber without being liable to be called to an account by the contingent remainder-men when they come in esse? In *Garth* v. *Cotton*, Lord *Hardwicke*, as before observed, expressly admits, that if there had been no trustees to support contingent remainders, in neither of these cases could relief be had in equity. It is, however, presumed that in the latter of these cases, that is to say where there is a tenant for life, relief might now be had by the contingent remainder-man, because his inheritance, of which the timber is part, is no longer in the power of the owner of the previous estate of freehold. But in the former of these cases, that is to say where there is a tenant for years, no relief could be had, because, irrespective of the Act, the contingent remainders would be void for want of an estate of freehold to support them. Where, therefore, the legal fee is not vested in trustees, a limitation to trustees to support contingent remainders may still be necessary, when there is only a previous estate for years; (unless the law be altered by the passing of the Lord Chancellor's Bill relating to contingent remainders), and it is conceived that even where there is a previous estate of freehold, it may still be useful, as the trustees to support contingent re-

mainders can, by an application for an injunction before the contingent remainder-man comes into esse, protect his estate from waste.

What amounts to waste at law, by whom it may be committed, and the remedies at law in respect thereof.]—Waste at law has been briefly defined as "any spoil and destruction done, or allowed to be done, to houses, woods, lands, or other corporeal hereditaments by the tenant thereof, during the continuance of his particular estate. 3 Steph. Comm. 521, 5th ed. Waste as distinguished from trespass, could only be committed by a limited owner, between whom and the person complaining thereof there was a *privity* of estate.

At common law tenants for life, by operation of law, viz., tenant in dower and tenant by the curtesy, were punishable for waste: *Lewis Bowles's Case*, 11 Rep. 81, 82; Co. Litt. 53 a. And tenants for life and for years became so by the Statute of Marlebridge (32 Hen. 3), and the Statute of Gloucester (5 Edw. 1).

As timber trees are part of the inheritance, waste might be committed by the tenant for life or years in felling or topping them, or doing any act whereby they might decay. And it should be borne in mind that by timber trees are meant—oak, ash, and elms in all places, and in some particular counties, by local custom, other trees are considered as timber. *Honywood* v. *Honywood*, 18 L. R. Eq. 306, 309, 310: Trower on Prevalence of Equity, p. 25.

A tenant for life may, however, cut down timber trees under twenty years of age for the purpose of allowing the proper development and growth of other timber in the same wood or plantation, for that is not waste, but is in fact for the improvement of the estate, and not for its destruction. (*Honywood* v. *Honywood*, 18 L. R. Eq. 310; and see *Gordon* v. *Woodford*, 27 Beav. 603; *Bateman* v. *Hotchkin*, 31 Beav. 486; *Earl Cowley* v. *Wellesley*, 1 L. R. Eq. 656. He may also fell fir trees under twenty years of age for the purpose of thinning them: *Pidgeley* v. *Rawling*, 2 Coll. 275.

The tenant for life also of a timber estate, that is to say, of an estate which is cultivated merely for the produce of saleable timber, and where the timber is cut periodically, may fell it in the ordinary course. The reason for the distinction between ordinary timber and timber growing on a timber estate is this, that as cutting the timber is a mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land; and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course, is looked upon

as the annual profits of the estate, and therefore goes to the tenant for life. Per Sir *G. Jessel*, M. R., in *Honywood* v. *Honywood*, 18 L. R. Eq. 310.

A tenant for life may also cut underwood in due course (*Hampton* v. *Hodges*, 8 Ves. 105; *Humphreys* v. *Harrison*, 1 J. & W. 581), and willows, leaving the stools or butts: *Phillipps* v. *Smith*, 14 M. & W. 589.

A tenant for life moreover may cut down all trees, not being timber (*Honywood* v. *Honywood*, 18 L. R. Eq. 310), with the exception, that he must not cut down those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. For if he cuts them down, he commits waste, as he prevents the growth of the timber. *Ib.* 310.

Such tenant for life, moreover, would commit waste by digging pits for gravel, lime, clay, brick-earth, stone or the like (except for repairs), or for mines of metal, coal, or the like, hidden in the earth, which were *not open* when the tenant came in (Co. Litt. 53, b.; *Viner* v. *Vaughan*, 2 Beav. 466); but he has a right to continue the working of pits or mines previously opened, though not, perhaps, where they are old and abandoned, or where mere preparations had been made for working them (*Clavering* v. *Clavering*, 2 P. Wms. 389; *Viner* v. *Vaughan*, 2 Beav. 466); but it seems that he could make new pits or shafts in working a mine already *open*, in order to pursue the same: (*Clavering* v. *Clavering*, 2 P. Wms. 388), or even a new (*Spencer* v. *Scurr*, 31 Beav. 334) vein. See also *Bagot* v. *Bagot*, 32 Beav. 509.

Where an estate is vested in trustees, the equitable tenant for life cannot cut timber without their consent (*Denton* v. *Denton*, 7 Beav. 388; *Pugh* v. *Vaughan*, 12 Beav. 517), but if he do so, the remainder-man will have a right to compensation, not only out of the rents as against the tenant for life, but also as against his incumbrancers: *Briggs* v. *Earl of Oxford*, 1 Jur. N. S. 817.

Where, however, in an instrument making a person tenant for life, a clause is inserted that he is to be "without impeachment of waste," he may fell timber and open new mines or pits (Co. Litt. 220 a, and the note 1), and will have full property in the produce: *Lewis Bowles's Case*, 11 Rep. 83, 84.

Where, however, trustees are made unimpeachable for waste, although at law they might cut timber in the same manner as a tenant for life without impeachment of waste, a Court of equity will require them to act in their trust with the same discretion as the Court itself would act: *The Marquis of Downshire* v. *Lady Sandys*, 6 Ves. 115.

Moreover, a tenant in tail, after

possibility of issue extinct, although a mere tenant for life, may, by reason of the inheritance which was once in him, commit waste like a tenant for life without impeachment of waste (*Williams* v. *Williams*, 15 Ves. 419; 12 East, 209); but a person to whom he conveys his estate will be considered as a mere tenant for life: Co. Litt. 28 a.; *George Ap.-Rice's Case*, 3 Leon. 241.

A rector or vicar is in the same position as an ordinary tenant for life, and has no right to fell timber except for necessary repairs to the vicarage-house, buildings, and premises (*Duke of Marlborough* v. *St. John*, 5 De G. & Sm. 174); but not for the purpose of making a general repairing fund (*Sowerby* v. *Fryer*, 8 L. R. Eq. 417, 422). And he may, perhaps, have a right to dispose of timber, and apply the proceeds in getting some other timber for repairs at a more convenient place. *Ib.* For it would be absurd to make a man who has cut down timber on an estate, drag that self-same timber the whole distance to the spot—it may be half a dozen or ten miles off—where it is wanted. For it will come to the same thing whether he uses the specific timber he has cut upon the woodwork repairs, or whether he sells it and buys other timber of equal value to be applied for the same purpose. *Ib.* And see *Wither* v. *Dean and Chapter of Winchester*, 3 Mer. 421, 426; *Knight* v. *Mosely*, Amb. 176.

And it seems that not only may the patron of a living proceed against a rector or vicar for an injunction to restrain the improper felling of timber, but notwithstanding the remarks in *Knight* v. *Mosely*, Amb. 176, and *Holden* v. *Weekes*, 1 J. & H. 278, he may proceed against them for an account of the proceeds of timber improperly felled, in order that they may be invested for the benefit of the advowson (*Sowerby* v. *Fryer*, 8 L. R. Eq. 423); at any rate it is clear that where the timber has been improperly felled, but not sold, by the rector or vicar, the patron may obtain an order from the Court that the timber may be sold, and the proceeds brought into Court. *Ib.*

And it appears that the ordinary may take proceedings to prevent waste by collusion between the patron and the incumbent: *Holden* v. *Weekes*, 1 J. & H. 278.

The remedies for waste at law were by the writ of waste (abolished by 3 & 4 Will. 4, c. 27, s. 36), by an action on the case for damages, by trover for the trees (which became the property of the remainder-man as soon as they were felled), or by an action for money had and received for the produce of the sale: *Seagram* v. *Knight*, 2 L. R. Ch. App. 632.

In cases of waste, however, resort was generally had to Courts

of Equity, not only because previous to 17 & 18 Vict. c. 125, s. 79 they had exclusive jurisdiction by injunction to interfere to prevent the threatened commission of waste, or to forbid its continuance, and had alone full power to take accounts, but also because the law was defective and afforded no remedy in some cases of what was termed legal waste, and in other cases it took no cognizance whatever of what was called Equitable waste. These cases it is now proposed to consider.

Interposition of Equity to prevent waste where there was no legal remedy.]—One of the first instances of the interposition of equity, where an action of waste could not be maintained at law, seems to have been the case put by Lord *Hardwicke* in *Garth* v. *Cotton*, of a tenant for life, with remainder to another for life, with remainder over in fee, or in tail. In such case the remainder-man in fee, or in tail, could have no action of waste; because the plaintiff in the action must recover the place wasted, and that would be an injustice to the remainder for life, which is not forfeited; and, if it should be recovered by the owner of the inheritance, it would never go back again. The remainder-man might, it is true, have another action of trover for the trees. However, in equity, to use the words of Lord *Hardwicke*, "this Court sustains a bill for an injunction, and this ab antiquo, according to the case in Moore, 554; where Lord *Ellesmere* says, he had seen a precedent for it so long ago as in the reign of Richard II." See also, *Tracy* v. *Tracy*, 1 Vern. 23; *Farrant* v. *Lovel*, 3 Atk. 723: and an injunction will be granted at the suit of a mesne remainder-man for life, without making the owner of the inheritance a party: *Dayrell* v. *Champneys*, 1 Eq. Ca. Ab. 400. But see *Mollineaux* v. *Powell*, 3 P. Wms. 268, n.

Upon the same principle as *Garth* v. *Cotton*, where there is tenant for life subject to waste, remainder for life dispunishable for waste, remainder in fee, the Court will not suffer an agreement between the two tenants for life to commit waste to take place against the remainder-man, before the time comes when the second tenant for life's power commences. *Robinson* v. *Litton*, 3 Atk. 210.

So, a ground landlord may have an injunction to stay waste against an underlessee, who holds by lease from the original lessee: *Farrant* v. *Lovel*, 3 Atk. 723.

In the case of an executory devise, Lord *Hardwicke*, in *Robinson* v. *Litton*, 3 Atk. 209, said that he should doubt whether an heir-at-law ought not to be restrained from committing waste in the meantime. In that case the testator devised lands to his son and his heirs, but in case he should not attain twenty-one, and die without

issue, then he gave the lands to his daughters, and directed them to be sold and the money to be divided among the daughters. The son, who wanted three quarters of a year of twenty-one, intended cutting down £3000 worth of timber; but Lord *Hardwicke* granted an injunction to restrain him, and at the hearing made that injunction perpetual, observing, "It is pursuing the intention of the testator, and preserving the value of the estates intended to go to his daughters." And Lord *Eldon*, in the case of *Stansfield* v. *Habergham*, 10 Ves. 278, stated it to be the doctrine of the Court, that, where there is an executory devise over, even of a legal estate, a Court of equity will not permit the timber to be cut down, more especially not, if there is an executory devise of a trust estate.

Recent cases, however, appear to decide that a devisee in fee with an executory devise over on his death without leaving issue is dispunishable for *legal* waste, but he must not commit *equitable* waste (*Turner* v. *Wright*, 1 Johns. 740, 2 De G. F. & Jo. 234); and it has also been decided that although a tenant in fee, subject to an executory devise over, is not impeachable for legal waste, it is competent to a testator to render him so by express words: *Blake* v. *Peters*, 10 W. R. (V. C. K.) 826; 1 De G. Jo. & Sm. 345.

So, where a mortgagee in fee in possession commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principal of his mortgage, the Court, on a bill brought by the mortgagor to stay waste, will grant an injunction: *Farrant* v. *Lovel*, 3 Atk. 723.

A mortgagor in possession may be restrained by the mortgagee from felling timber (*Farrant* v. *Lovel*, 3 Atk. 723; *Usborn* v. *Usborn*, 1 Dick. 75; *Humphreys* v. *Harrison*, 1 J. & W. 581); but not, it seems, unless the mortgagee shows that the security would be insufficient or scanty without the timber: *Hippesley* v. *Spencer*, 5 Madd. 422; *King* v. *Smith*, 2 Hare, 239.

It seems to be now settled, although the contrary opinion seems formerly to have prevailed (*Parteriche* v. *Powlet*, 2 Atk. 383), that the Court will not interfere to prevent or remedy permissive waste: *Lord Castlemain* v. *Lord Craven*, 22 Vin. Ab. 523 tit. Waste, pl. 11; *Wood* v. *Gaynon*, Amb. 395; *The Marquis of Lansdowne* v. *The Marchioness Dowager of Lansdowne*, 1 J. & W. 522; *Powys* v. *Blagrave*, 4 De G. Mac. & G. 448; *White* v. *Cann*, 1 Ir. Ch. Rep. 205; but see *Caldwell* v. *Baylis*, 2 Mer. 408.

The case of *Re Skingley* (3 Mac. & G. 221) was founded on the express obligation of the lunatic to keep in repair. See also *White* v. *Cann*, 1 Ir. Ch. Rep. 205.

But an account would be granted where there is an express covenant from the tenant for life to repair: *Marsh* v. *Wells*, 2 S. & S. 87.

As to the legal liability for permissive waste, see *Greene* v. *Cole*, 2 Wms. Saund. 252 and notes; and *Harnett* v. *Maitland*, 16 M. & W. 257.

Interference of Equity in cases of equitable waste of a malicious and destructive character by tenant for life without impeachment of waste.] —At common law, the clause, *without impeachment of waste*, only exempted a tenant for life from the penalty of the statute, the recovery of treble value, and the place wasted, not expressly giving the property of the thing wasted; but in *Lewis Bowles's Case* (11 Rep. 79), it was determined that these words also gave the *property*. The necessary consequence of which was, that, in general, unless under particular circumstances, as, for instance, where the exemption from liability to waste was made subordinate to a discretionary power in trustees to fell timber (*Kekewich* v. *Marker*, 3 Mac. & G. 311; and see *Briggs* v. *Earl of Oxford*, 5 De Gex & Sm. 156); a tenant for life *without impeachment of waste*, could not be restrained in equity from committing ordinary waste; for that would be to determine that he should not make use of the property which the law allowed him. But, after the decision in *Lewis Bowles's Case*, several instances were considered, in which this very large power might be exercised contrary to *conscience, and in an unreasonable manner*, by a tenant for life; as, where *his act was to the destruction* of the thing settled, and equity interfered. See *Aston* v. *Aston*, 1 Ves. 265.

A leading authority upon this subject is *Vane* v. *Lord Barnard*, 2 Vern. 78, commonly called *Lord Barnard's Case*; there Lord Barnard, who, under the marriage settlement of his son, was tenant for life *without impeachment of waste* of Raby Castle, with remainder to his son for life, having taken some displeasure against his son, got two hundred workmen together, and of a sudden, in a few days, stripped the castle of the lead, iron, glass doors, boards, &c. to the value of 3000*l*. Lord *Cowper* granted an injunction to stay committing of waste by pulling down the castle, and decreed that the castle should be put into its former condition; and, for that purpose a commission was to issue to ascertain what ought to be repaired, and a Master was directed to see it done at the expense of Lord Barnard, and decreed the plaintiff his costs. See *S. C.*, Prec. Ch. 454; Gilb. Eq. Rep. 127; 1 Eq. Ca. 399; 1 Salk. 161; and see *Duke of Leeds* v. *Earl of Amherst*, 20 Beav. 239.

But where a tenant for life without *impeachment of waste*,

has pulled down an old mansion and used the materials in building a better mansion-house in a more desirable position, his estate has been held not to be liable to account for the value of the materials of the old house: *Morris* v. *Morris*, 3 De G. & Jo. 323, *post*, pp. 809, 810.

Upon the principle of restraining a tenant for life without impeachment of waste from exercising his legal power contrary to conscience, and in an unreasonable manner, Lord *Hardwicke* said, that if tenant for life without impeachment of waste, pulled down farm-houses in general he would no more scruple restraining him, than he would from pulling down the mansion-house, (unless he pulled down two to make into one, in order to bear the burthen but of one), it tending equally to the destruction of the thing settled. *Aston* v. *Aston*, 1 Ves. 265.

So, likewise, if he should grub up a wood settled, so as to destroy the wood absolutely, he should restrain him, as it would be what is termed in *Abrahal* v. *Bubb* (2 Freem. 54) *extravagant and humorsome waste: Ib.* See also *Dunn* v. *Ryan*, 7 I. R. Eq. 143.

Although the Courts of Equity would not, in the absence of fraud and where there was *no privity* between the parties, interfere at the instance of a party claiming real property under a legal title, by restraining ordinary waste by a defendant in possession thereof, they would grant an injunction to restrain waste of a malicious and destructive character, such as the pulling down the capital messuage, stripping the estate of its timber, or such-like acts, even although the title of the plaintiff might be denied by the defendant: *Earl Talbot* v. *Hope Scott*, 4 K. & J. 96; *Neale* v. *Cripps*, 4 K. & J. 472. And see *Anwyll* v. *Owens*, 22 L. J. Ch. 995.

And where a plaintiff in possession sought to restrain one who claimed by an adverse title, the tendency of the Court was to grant an injunction, at least when the acts committed did or might tend to the destruction of the estate. See *Lowndes* v. *Bettle*, 33 L. J. N. S. (Ch.) 451; 10 Jur. (N. S.) 226; 12 W. R. (V. C. K.) 399: in that case, a person, not being in possession of an estate, claimed it as heir-at-law, and entered upon it, cut down trees, and cut sods, and threatened to repeat his conduct in order to establish his alleged title as against the possessor, who by himself and his ancestors had been in possession of the estate for upwards of eighty years, it was held by Sir *R. T. Kindersley*, V.-C., upon a bill filed by the possessor against the claimant, that as the acts of the defendant might be injurious to the inheritance, he must be restrained by the injunction of the Court from committing them.

See also *Stanford* v. *Hurlstone*, 9 L. R. Ch. App. 116.

And now by the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66) sect. 25, subsect. 8, it is amongst other things enacted, "that if an injunction is asked, either before, or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable." See Trower's Prevalence of Equity, pp. 76, 77, 78.

Interference of Equity in cases of Equitable waste by tenant for life without impeachment of waste felling ornamental timber.]—Although a tenant for life without impeachment of waste, and a tenant in tail after possibility of issue extinct, may fell all the ordinary timber upon the estate, it has long been established, that a Court of equity will restrain them from committing what is called *equitable waste*, by felling timber planted or left standing for the shelter or ornament of a mansion-house or grounds (*Rolt* v. *Lord Somerville*, 2 Eq. Ca. Ab. 759; *Packington's Case*, 3 Atk. 215; *Strathmore* v. *Bowes*, 2 Bro. C. C. 166; *Chamberlyne* v. *Dummer*, 1 Bro. C. C. 166; 3 Bro. C. C. 549), even if planted by the tenant for life himself: *Coffin* v. *Coffin*, Jac. 71.

The principle upon which the Court has gone, seems to be, that if the testator, or the author of the interest by deed, had gratified his own taste by planting for ornament, though he had adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and, upon a competition between those parties, the Court should see that the tenant for life was right, and the other wrong, in point of taste, yet the taste of the testator, like his will, binds them; and, it is not competent to them to substitute another species of ornament for that which the testator designed. The question, which is the most fit method of clothing an estate with timber for the purpose of ornament, cannot be safely trusted to the Court.—Per Lord *Eldon*, in *Marquis of Downshire* v. *Lady Sandys*, 6 Ves. 110. So, likewise, Sir *William Grant* has observed, "As the Court cannot determine what is ornamental timber, it being merely a matter of taste, they therefore say, that what was planted for ornament must be considered as ornamental:" *Lord Mahon* v. *Lord Stanhope*, 3 Madd. 423, n.; and see *Burges* v. *Lamb*,

16 Ves. 174; *Coffin* v. *Coffin*, Jac. 70; *Marker* v. *Marker*, 9 Hare, 1, 17.

The principle has been extended from the ornament of the house to outhouses and grounds, then to plantations, vistas, avenues, and to all the rides about the estate for ten miles round.—Per Lord *Eldon*, C., 6 Ves. 110; and see *Jebb* v. *Jebb*, *Johnes* v. *Johnes*, and *Lord Tamworth* v. *Lord Ferrers*, cited 6 Ves. 110; *Williams* v. *M'Namara*, 8 Ves. 70; but although the protection may be afforded to rides or avenues at a considerable distance from a mansion, it will not necessarily be extended to the woods through which they pass, so as to prevent their being cut for repairs: *Wombwell* v. *Belasyse*, 6 Ves. 110 a. n. 2nd ed.

In the *Marquis of Downshire* v. *Lady Sandys*, 6 Ves. 107, the injunction was extended to clumps of firs on a common two miles from the house, although land belonging to other persons intervened. "If," observed Lord *Eldon*, C., "the principle has been rightly applied, it is very difficult in argument to say, it cannot be applied to a common as well as in field lands, and that the contiguity or remoteness, *if de facto it was planted for ornament*, can alter the principle upon which the rule of the Court is to be applied."

In *Day* v. *Merry*, 16 Ves. 375, the principle applicable to equitable waste was extended to trees planted for the purpose of excluding objects from view.

But circumstances may render the felling of ornamental timber justifiable. "For, if a tempest had produced gaps in a piece of ornamental planting, by which unequal and discordant breaks and divisions were occasioned, it would be going too far to hold, that cutting a few trees to produce an uniform and consistent, instead of an unpleasant and disjointed appearance, should be construed waste."—Per Sir *William Grant*, M. R., in *Lord Mahon* v. *Lord Stanhope*, 3 Madd. 523, n.

So it seems that timber might be cut which injured or impeded the growth of any other trees adjoining thereto, which were of so much importance to the purposes of ornament or shelter, that the removal of the timber so cut was essential to such purposes of ornament or shelter: *Lushington* v. *Boldero*, 6 Madd. 149, 150.

So, likewise, ornamental timber may be felled if it be so near to a house as to be prejudicial to its healthiness, but the onus of proof will lie upon the persons felling the timber. See *Campbell* v. *Allgood*, 17 Beav. 623, there trustees, at the request of a tenant to whom they had let a house, cut down some beech trees, and a large horse-chestnut, which sheltered the windows of the mansion-house and servants'-hall, and were about to cut down more. Sir *J. Romilly*, M. R., granted an injunction

against the trustees, although he refused it as to the tenant, as it was not shown that he either had, or was about to commit, any waste. "Upon the result of the evidence," said his Honor, "I think that these trees did form a shelter to and hide that part of the house, which, as it contained the offices, probably was the most unsightly. I am of opinion, also, that the horse-chestnut tree was, to some extent, prejudicial to the healthiness of the house, but I am not satisfied that such was the case with respect to the beech-trees. The *burthen of proof lies on the trustees to satisfy me that they were prejudicial*, for they had no authority to cut trees which were ornamental, and conducive to the beauty of the house. I think they ought to have applied, either to the persons interested in the property for their assent, or to the Court for its authority in cutting these trees; and as they have not satisfied me that it *was absolutely necessary* for the well-being, salubrity, and comfort of the residence, that these trees should be cut, I think I must grant an injunction."

It has been observed, that ornamental timber has been protected from its connection with a mansion-house or its grounds; the question, therefore, naturally arises, whether, when a mansion-house has been pulled down, the Court will still interfere to preserve the timber.

Where the owner in fee of an estate, with a mansion-house upon it, and trees planted, or left standing for ornament around or about the mansion-house, pulls it down without any intention of rebuilding it, a tenant for life without impeachment of waste, under the will of such an owner, is entitled to cut down the trees. See *Micklethwait* v. *Micklethwait*, 1 De G. & Jo. 504; 5 W. R. (L. J.) 861; 26 L. J. (Ch.) 721; 3 Jur. N. S. 1279.

Where, however, it is either proved, or may be inferred, that in demolishing, or after the demolition of, a mansion-house, a testator intended, designed, or wished to rebuild it, or to reside at, or erect a mansion-house, or place of residence on that estate, or intended, designed, or wished, that any devisee under his will should do so, timber, which was ornamental to the mansion-house while in existence, might be protected by the Court from being felled by a tenant for life without impeachment of waste. See the remarks of Lord Justice *Knight Bruce* in *Micklethwait* v. *Micklethwait*, 5 W. R. (L. J.) 862; 1 De G. & Jo. 519.

In two well-known cases, the ornamental timber has been protected although the mansion-house had been pulled down. The first of these cases is, *Wellesley* v. *Wellesley*, 6 Sim. 497; there a mansion-house, park, and pleasure-grounds, and several ornamental villas, near the park, were limited

in strict settlement, under which the defendant was tenant for life without impeachment of waste, with remainder to his first and other sons, successively in tail male. And the tenant for life in possession was empowered to grant *building leases* of the settled estates, and the trustees were empowered, at the request of the tenant for life, to cause the mansion-house to be pulled down, or any other mansion-houses which then were, or should be, standing upon any part of the estates, without rebuilding the same, and to sell the materials thereof, and apply the proceeds in paying off incumbrances on the estates. When the settlement was executed, the park, pleasure-grounds, and gardens, contained a great number of trees which had been planted, or were left standing for the ornament or shelter of the mansion-house, park, and pleasure-grounds, in clumps, lines, avenues, or vistas, or in single trees; and the lands adjoining to, and forming the approaches to the mansion-house, park, and pleasure-grounds, also contained a great number of trees which had been planted, or left standing, for the ornament or shelter of the mansion-house, park, and pleasure-grounds, and also of the villas contiguous thereto. The mansion-house was pulled down pursuant to the power, and the materials sold. The bill alleged that a large proportion of the trees marked for felling were not fit to be felled for timber, and that by the felling thereof, the whole of the demesne would be laid waste and become wholly incapable for a very long period of years of being applied to the purposes of a residence, either by the persons who, under the settlement, might thereafter become entitled in *possession* to the inheritance of the domain, or by those to whom such persons might *demise the same*, and that the lands and messuages erected thereon, would be greatly injured or lessened in value. The bill prayed that the defendant might be restrained from cutting down any timber or other trees then standing in and upon the park, garden, and pleasure-grounds, and which were planted or growing there for the protection or shelter of the park, garden, and pleasure-grounds, or for the ornament thereof, or from felling or cutting down any timber or other trees which were planted, and stood, or grew in avenues, vistas, or clumps, or separately or singly, for the ornament of the park, garden, and pleasure-grounds, or other grounds and lands thereto belonging. Sir *L. Shadwell*, V.-C., granted an injunction *ex parte*; and Lord *Lyndhurst*, C., refused to dissolve it on the coming in of the answer. It was argued upon the hearing that there was no case in which, the mansion-house having been pulled down under a provision of the settlement, the Court had protected the timber which

would have been ornamental to it if it had remained: that the timber was connected with the house, and the house being gone, the protection of the Court had ceased. But Sir *L. Shadwell*, V.-C., made the injunction perpetual, considering, as no new evidence was produced, that he was bound by what Lord *Lyndhurst* had done.

The other case is that of *Morris* v. *Morris*, 15 Sim. 505; there estates were settled by the grandfather of the plaintiff on himself for life, remainder to trustees for 1000 years upon certain trusts, and subject thereto *to the use* of the same trustees during the life of the defendant (the son of the settlor), *without impeachment of waste* (provided the same should be committed or suffered with the privity and assent of the defendant), upon trust, to preserve the contingent remainders thereinafter limited, and to permit the defendant to receive the rents of the estates during his life, with remainder to the use of the plaintiff during his life, with remainder to the use of the plaintiff's first and other sons successively in tail male, with remainder to the use of himself in fee. And the settlor reserved to himself, and gave to the defendant and plaintiff, when they should be in possession or in receipt of the rents of the estates, power to grant *building leases*. On the death of the settlor, the defendant entered into possession of the estates; and, whilst the plaintiff was an infant, pulled down the mansion-house thereon. Some years after the plaintiff had attained twenty-one, the defendant felled some, and marked for felling other trees, which his father had either planted or left standing and growing for the ornament or shelter of the house, in the lawns, gardens, and pleasure-grounds belonging to it. Whereupon, the bill was filed to restrain the defendant from felling any more trees, but did not ask any relief with regard to the pulling down of the house. Sir *L. Shadwell*, V.-C., granted the injunction. "It appears to me," said his Honor, "that the general rule regarding trees planted for shelter and ornament must apply to this case, unless upon the face of the settlement, or independently of the settlement, you can show that the rule is not applicable. I admit that this case differs very widely in some respects from the case of *Wellesley* v. *Wellesley*; but I observe that there is a power in the settlement to demise to persons who shall be willing to build houses or to repair houses; and I think that that does tend to sustain the right of those in remainder to have the trees preserved which were originally planted for shelter and ornament. Because, though the mansion-house, which the trees were intended to shelter and ornament, no longer exists, yet there is a possibility of leases being made for the purpose of building houses, which may re-

ceive a benefit from the ornament or shelter afforded by the trees; and, in that respect, it is something like the case of *Wellesley* v. *Wellesley*. But my opinion is, that I am bound to administer the general law of this Court, which will not permit the person who is merely tenant for life without impeachment of waste, to cut down these trees, which, it is admitted on all hands, were either planted or left standing for shelter and ornament." This decision was affirmed on appeal by Lord *Cottenham*, 11 Jur. 196.

With reference to the case of *Morris* v. *Morris*, Lord Justice *Turner* has observed, that there seem to be two grounds on which the injunction in that case was granted;—that the *tenant for life* could not, by pulling down the mansion-house, entitle himself to the ornamental timber; and that if he was justified in pulling down the mansion-house by reason of the estate in trustees being unimpeachable of waste, there was an intention to be collected from the power to grant building leases, that the mansion-house should be rebuilt: and that it was upon the latter ground, too, and upon the ground of there being villas upon the estate, and the general scope of the settlement that the case of *Wellesley* v. *Wellesley* seems to have proceeded. See 5 W. R. (L. J.) 864; 1 De G. & Jo. 529.

A Court of equity will restrain a tenant for life *without* impeachment of waste, from cutting down saplings not proper to be felled (*O'Brien* v. *O'Brien*, Amb. 107; *Marquis of Downshire* v. *Lady Sandys*, 6 Ves. 108; *Coffin* v. *Coffin*, 6 Madd. 17); and from cutting underwood before it is of sufficient growth (*Brydges* v. *Stevens*, 6 Madd. 279); but not from felling timber, merely because it is not full grown or proper for building; for, as observed by Lord *Hardwicke*, C., the reasoning of the cases of pulling down farm or mansion-houses, or felling trees planted for ornament or shelter, does not come up to this. The consequence of cutting down timber, perhaps too young, does not tend to the destruction of the thing settled, although it tends to its prejudice for a time, for timber will grow again in a few years: not so of houses. Nor will young trees planted in avenues, pulled down, serve for the purpose as before; for, having been put there for the convenient enjoyment of the house, they are considered as appurtenant thereto, and can no more be destroyed by such tenant for life than the house itself. But it would be very dangerous for the Court to use such latitude as to extend this to the taking away the profits of the estate by tenant for life to the prejudice of the remainder-man, which his estate for life without impeachment for waste, gives him liberty to do: *Aston* v. *Aston*, 1 Ves. 266; and see *Coffin* v. *Coffin*, Jac. 72.

A tenant in tail after possibility of issue extinct, although unimpeachable of waste at law (*Lewis Bowles's Case*, 11 Rep. 79; *Williams* v. *Williams*, 15 Ves. 428; 12 East, 209), is within the principle of equitable waste, and will be restrained from committing malicious or extravagant waste, such as cutting down ornamental timber, and pulling down houses. "The common case," observes Sir *John Leach*, "of a tenant in tail after possibility of issue extinct, is where the estate is descendible to the issue of the wife alone. Until the death of the wife without issue, this estate has all the legal incidents of other estates tail; but upon the death of the wife without issue, the estate has no longer a descendible quality, and the husband's interest is, in effect, limited to his life. His estate becomes ranked in the law amongst estates for life, and he may make exchange with a mere tenant for life. In *Lewis Bowles's Case* (11 Rep. 79), however, it was held at law, that, as he had, before the death of his wife, an estate tail, and was once owner of the timber, that, notwithstanding the death of his wife, and the change in the quality of his estate, he should still continue unimpeachable of waste. In a Court of law, therefore, a tenant in tail after possibility of issue extinct, is, in effect, a tenant for life without impeachment of waste; and Courts of equity have, in the question of equitable waste, confounded him with other tenants for life without impeachment of waste, and have not entered into the distinction that he is unimpeachable of waste, not by the provision of the grantor, but as a legal incident to his estate:" *Attorney-General* v. *Duke of Marlborough*, 3 Madd. 538. See, also, *Abrahal* v. *Bubb*, 2 Show. 69; 2 Freem. 52; 2 Eq. Ca. Ab. 757; 2 Swanst. 172; *Anon.*, 2 Freem. 278; *Cooke* v. *Whalley*, 1 Eq. Ca. Ab. 400.

In equitable as in legal waste, if one act of waste be established, the Court will restrain equitable waste generally: *Coffin* v. *Coffin*, 6 Madd. 17.

There does not appear to be any settled form of inquiry as to what is ornamental timber applicable to all cases, for the question to what extent ornamental timber may be cut, must, it seems, depend upon the circumstances of each particular case, and the proper inquiry to be directed must vary accordingly. For instance, in some cases a wood may have been dedicated by the absolute owner for the purpose of ornament and shelter only; in others it may have been so dedicated, subject to its being used in the first place for the purpose of repairs, or even sale; and the form of inquiry would necessarily differ in each of these cases. See *Ford* v. *Tynte*, 2 De G. Jo. & Sm. 127, 134, and the form of inquiry there given, and the observations thereon; see

also *Halliwell* v. *Phillips*, 4 Jur. (N. S.) 607; *Wombwell* v. *Belasyse*, 6 Ves. 110, n.

The orders to restrain equitable waste by the destruction of timber planted for shelter or ornament, or of too young growth, are generally drawn up in the terms used in *Chamberlayne* v. *Dummer*, viz., "that an injunction be awarded to restrain the defendant, Harriet Dummer, her servants, workmen, and agents, from cutting down any timber and other trees growing on the estate in question, which are planted or growing there for the protection or shelter of the several mansion houses belonging to the said estate, or for the ornament of the said houses, or which grow in lines, walks, vistas, on other grounds thereunto belonging; and that the injunction do also extend to restrain the said defendant, her servants, workmen, or agents, from cutting down any timber or other trees, except at seasonable times, and in a husbandlike manner; and also from cutting down saplings or young trees not fit to be cut, as and for the purposes of timber, until the hearing of this cause, or further order of the Court."—Reg. Lib. A., 1781, fol. 452.

Where there has been a trust or restriction created for the preservation of ornamental timber, the Court will endeavour to enforce it, as it is not like a trust for purposes of benevolence, as to which the objects are unlimited and no standard can be found: *Marker* v. *Marker*, 9 Hare, 1, 18, 20.

Where, moreover, trustees have power to fell timber large enough to comprehend ornamental timber, the Court, it seems, would not allow them unnecessarily to execute their power, to fell ornamental timber, but would direct them to leave that and to fell the timber which was not ornamental: *The Marquis of Downshire* v. *Lady Sandys*, 6 Ves. 109.

But a Court of equity will not interfere with an ordinary tenant in tail, who may, at his pleasure, cut down all timber for whatever purpose planted, or pull down all buildings upon his estate; for, as observed by Sir *John Leach*, V.-C., "With the exception of alienation, including leases, unless according to the statute, a tenant in tail is at this day to be considered as much the absolute owner of the estate as a tenant in fee simple, and, as such, may do what he pleases with the buildings and timber on the estate:" *Attorney-General* v. *Duke of Marlborough*, 3 Madd. 532; *Saville's Case*, cited *ante*, p. 13.

Whether an infant tenant in tail can commit equitable waste, does not appear to have been actually determined. It would seem, however, that he has just as much power to do so, as tenants in tail prohibited by statute from barring the entail. He has clearly as against the remainder-man, the

same right to open mines (*Lyddal* v. *Clavering*, Amb. 371, cited in notis, Blunt's ed.), and fell timber (*Saville* v. *Saville*, 1 Ves. 547, cited), as a tenant in tail of full age. In a remarkable case an infant tenant in tail in possession, in a very bad state of health, and not likely to live to full age, by his guardian cut down a great quantity of timber just before his death, to a very great value. The remainder-man applied for an injunction, but could not prevail. *Saville's Case*, Ca. t. Talb. 16, cited *ante*, p. 13.

It would, however, be the duty of his guardian or trustee to fell only such timber as was fit and proper to be felled in a due course of management: *Hussey* v. *Hussey*, 5 Madd. 44.

As to whether the produce of timber felled on the estate of an infant is realty or personalty, see note to *Fletcher* v. *Ashburner*, *post*, p. 940.

It seems that tenants in tail, restrained by statute from barring their issue, or those in remainder with reversion to the Crown, are not, on that account, within the principle of equitable waste; for, to use the words of Sir *John Leach*, V.-C., "They have all the legal rights and incidents which belong to an estate of this character, except where such rights and incidents are specially qualified by the provisions of the statute, and there being no qualification with respect to the right of cutting timber, they are as much the legal owners of the timber as if they were tenants in fee simple . . . . No instance can be stated in which a Court of equity has ever interfered against such a tenant in tail, upon the principle of equitable waste." See *Attorney-General* v. *Duke of Marlborough*, 3 Madd. 498, 536, 539. However, his Honor in that case held, on demurrer, that the Duke of Marlborough for the time being is, under the Act 5 Anne, c. 3, bound to maintain Blenheim-house for the future residence of those to whom the succession was limited, and that the Court was bound to interfere to prevent the destruction of the house, and of the ornamental timber about it. "I am clearly of opinion," said his Honor, "that the Duke of Marlborough, having no power of destruction over the house, has no power of destruction over timber which is essential to the shelter or ornament of the house, and I must overrule a demurrer which, in effect, insists upon an absolute and unqualified right to cut all timber."

By a recent Act, the *legal* power of a tenant for life without impeachment of waste to commit equitable waste is taken away. See the Judicature Act, 1875 (36 & 37 Vict. c. 66, sect. 25, subsect. 3), which enacts that "an estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon the *tenant for life* any legal right

to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate."

With regard to this sub-section it has been well observed by a learned author, that "it does not appear why estates for years are not within it. Such cases, however, and all other estates not expressly within it, are, if dispunishable at law but not in equity, practically brought within it, by sub-section 11, for it is then a conflict or variance between the rules of equity and the common law." Trower's Prevalence of Equity, p. 22. It may also be observed that tenant in tail after possibility of issue extinct is not mentioned in the sub-section.

Account for waste how far incident to an injunction.]—One important objection taken in *Garth* v. *Cotton* was this, that, although it was admitted a bill might have been maintained by the trustees to preserve contingent remainders, to stay waste before it was committed, yet it did not follow from thence, that after that was over, a bill might be brought for an account; and it was argued, that the jurisdiction of the Court to decree an account of the value of the timber was only incident to the jurisdiction of granting an injunction. In the previous case of *Jesus College* v. *Bloome*, 3 Atk. 262, Amb. 54, where a bill was brought solely to have an account and satisfaction for waste in cutting down trees and carrying off stones, against the defendant, an assignee of the lessee of the college, after an assignment of the term, and for waste done before assignment, Lord *Hardwicke*, C., according to the reports, dismissed the bill with costs, although he himself says, in *Garth* v. *Cotton*, that it was dismissed without costs. "The first question," said his Lordship, "is whether bills are to be maintained in this Court, merely for timber cut down after the term is gone out of the tenant by assignment? or whether such bills can only be brought for an account of such waste done, without, at the same time, praying an injunction? and I am of opinion that they cannot. Waste is a loss for which there is a proper remedy by action. In a Court of law the party is not necessitated to bring an action of waste, but he may bring trover; those are the remedies, and therefore there is no ground of equity to come into this Court, for satisfaction of damages is not the proper ground for the Court to admit of these sorts of bills, but the staying of waste, because the Court presumes, when a man has done waste he may commit the same again, and therefore will suffer the lessor or reversioner, when he brings his bill for an injunction to stay waste, to pray, at the same time, an account of the waste done; for, though a Court

of law may give damages, yet it cannot prevent further waste: and it is upon this ground, to prevent multiplicity of suits, that this Court will decree an account of waste done, at the same time with an injunction; just like the case of a bill brought for discovery of assets, an account may be prayed at the same time; and though originally the bill was only brought for a discovery of assets, yet to prevent multiplicity of suits, the Court will direct an account to be taken." So in *Smith* v. *Cooke* (3 Atk. 381), Lord *Hardwicke*, C., took the same distinction. He said, that "after the estate of the lessee is determined, and a new lessee is in possession, a person, merely for an account of timber felled by way of wrong, could not come into a Court of equity. But where the person continues in possession, and, consequently, in a condition of committing more waste, there it is proper for a person to come into equity for an injunction to stay waste;" and though the plaintiffs in that case had not actually moved for an injunction, his Lordship held that they might reserve that relief till the hearing of the cause, if they thought proper, as it was incident to their estate, and they were entitled to an account for such waste.

Now, the case of *Garth* v. *Cotton* differs materially from *Jesus College* v. *Bloome:* because, in the latter, there was clearly a remedy at law by trover; in the former, there was no remedy at law, and unless an account had been granted, a great wrong would have been done to the plaintiff, and he would have been without remedy.

The view taken by Lord *Hardwicke*, in *Jesus College* v. *Bloome*, has been recognised in many later cases. See *Pultney* v. *Warren*, 6 Ves. 89; *Grierson* v. *Eyre*, 9 Ves. 346; *Richards* v. *Noble*, 3 Mer. 673.

In *Lee* v. *Alston*, 1 Bro. C. C. 194; 3 Bro. C. C. 37; 1 Ves. jun. 78; Lord *Thurlow*, indeed, acted contrary to the doctrine laid down by Lord *Hardwicke* in *Jesus College* v. *Bloome;* for, admitting that trover would lie at law for the timber felled by the tenant for life, who was still in possession, yet he granted the account, although an injunction was not prayed. "I have no doubt," said his Lordship, "an action of trover might be maintained. What I meant when the cause came on before was this:—Suppose they come for a discovery and an account, and that a discovery is made accordingly, I should agree that the plaintiffs ought to be satisfied with it; but the admission that some has been wrongfully cut, gives them a right to an account of that . . . . . My present opinion is, that if any timber has been cut from the estate, where there was no right to cut any, that circumstance gives a right to the account. If you can make out that the plaintiff has no right to come

here, but ought to be left to law, I will turn round her bill, because she has not brought an action: but I thought the circumstance of timber having been wrongfully cut down, entitled her to the account, as in the case of a bailiff—if a man enters upon another's lands, and makes money of his property, he will be considered as a bailiff, and must account." See *Bagot* v. *Bagot*, 32 Beav. 509.

Where mines are opened, an account, it seems, will in all cases be granted, although no injunction is asked: *Bishop of Winchester* v. *Knight*, 1 P. Wms. 406; and in *Jesus College* v. *Bloome*, Amb. 55, Lord *Hardwicke* says, "The Court always distinguishes between digging of mines and cutting of timber, because the digging of mines is a sort of trade."

In *Parrot* v. *Palmer*, 3 My. & K. 632, where it was argued that, as there could be no injunction, there could be no account, Lord *Brougham* entered into an elaborate examination of the authorities. "It may be laid down generally," observed his Lordship, "that, unless in the case of mines, the rule is, no injunction —no account. In *Jesus College* v. *Bloome*, 3 Atk. 262, where an account was prayed of timber cut by a tenant before the assignment of his lease, and the term being gone, no injunction could be had, the Court held that no account lay: and so it was decided, though the Court said obiter, that mines formed an excepted case, being in the nature of a trade or business. In *Whitfield* v. *Bewit*, 2 P. Wms. 240, where an account of timber cut, and an injunction against opening mines, were prayed, the Court appears to have given the account only as incident to a discovery. Indeed, in *Sayer* v. *Pierce*, 1 Ves. 232, which was a case of mines, but where no possession had been shown by the plaintiff, Lord *Hardwicke* would only entertain the suit in respect of the confusion of boundaries, and he retained the cause for a year, with liberty to bring ejectment. In *Garth* v. *Cotton*, Lord *Hardwicke* takes a somewhat different view of his own judgment in *Jesus College* v. *Bloome*, from that which the report of the case gives, but he does not overthrow his doctrine: for *he takes the broad distinction, that in the one case there was a legal remedy, and in the other no remedy at all.* But it is certain, that if *Lee* v. *Alston* be law, the distinction formerly taken, particularly in *Jesus College* v. *Bloome*, is shaken, if not overthrown, and a principle established—that wherever timber is cut on the estate by one not having right, account will lie, because, to use Lord *Thurlow's* expression, the wrong-doer may be treated as a bailiff. And yet Lord *Thurlow* assumes throughout, that there is all the while a remedy

at law. It must, however, greatly detract from the weight of a doctrine so decidedly opposed to the distinct and sensible opinion of Lord *Hardwicke*, in *Jesus College* v. *Bloome*, that, neither in the two reports of Lord *Thurlow's* judgment, when the case was last before the Court (3 Bro. C. C. 37, and 1 Ves. jun. 78), nor in the year 1779 (1 Bro. C. C. 194); when it was formerly heard, is there the least mention made of that celebrated case, nor, indeed, of *Sayer* v. *Pierce*." See *Powell* v. *Aiken*, 4 K. & J. 343; *Wright* v. *Pitt*, 12 L. R. Eq. 408.

It is, however, clear, that, in cases of equitable waste, an account will be granted without an injunction. (See *Duke of Leeds* v. *Earl of Amherst*, 14 Sim. 357, 367; *S. C.*, 2 Ph. 117, and cases there cited.)

But in a recent case, where ornamental timber had been actually felled, and the reversioner claimed damages in an administration suit against the estate of the tenant for life in respect of such equitable waste, it was held that the amount of damages could only be measured by the damage done to the inheritance, and under the circumstances no damages were awarded: *Yelverton* v. *Bath*, 10 L. R. Eq. 465.

Upon the whole, we may conclude, that where there was a remedy at *law* for waste, in the case of *timber*, an account would not be decreed except as incident to an injunction. But in the case of waste in *mines*, although there might be a remedy at law, an account would be granted independent of an injunction; where, however, as in *Garth* v. *Cotton*, there was only a remedy in equity, and in cases of equitable waste, an account would be granted, although there was no injunction.

There was, moreover, this distinction between what a plaintiff might obtain by an action of trover, and by proceedings in equity. By the former he would obtain the value of the timber; by the latter he must take the account as it lay, unless there were some special case to vary the terms of it. *Lee* v. *Alston*, 1 Ves. Jun. 82.

Although an account will be granted against a tenant for life without impeachment of waste who pulls down a mansion-house and sells the materials (*Duke of Leeds* v. *Earl of Amherst*, 14 Sim. 357; 2 Ph. 117), it will, it seems, be refused where the materials of the old house are used in building a new house. See *Morris* v. *Morris*, 3 De G. & Jo. 323: there a tenant for life without impeachment for waste pulled down the mansion-house, and built a better in a more desirable situation upon another part of the settled estates. After his death the persons entitled in remainder filed a bill to obtain compensation for the pulling down the old house. It was proved that the bulk of the materials of the old house had

been employed in building the new one, and there was no evidence that any part of the materials had been sold. It was held by the Lords Justices, affirming the decision of Sir *John Stuart*, V.-C. (6 W. R. 427), that the bill had been rightly dismissed. "I do not," said Lord Justice *Turner*, "rest my decision in this case upon the fact of the estate having been improved by the building of the new mansion-house and the pulling down of the old one; for I am not at all satisfied that the question of improvement or no improvement is one by which the Court ought to be guided. I apprehend that the principle upon which the Court proceeds in these cases is, that the tenant for life of an estate is liable to account in equity for profits derived by him from an improper use of his legal powers, in committing equitable waste. If, therefore, the materials of this house had been sold, and the deceased tenant for life had received the proceeds, in my opinion this would have been a case for an account. But all that can be said in the present case, as to any benefit that has been derived by the deceased tenant for life, is this—that he enjoyed the use of the materials of the old house during his life, in a different state from that in which they originally existed on the estate. They remained on the estate, but they remained as materials attached to a new house, and not to the original house to which they were formerly attached; and I do not find any evidence in the case that there has been any sale of the materials, or any other profit derived by the tenant for life, than by the enjoyment of the materials in an altered state. I think that such enjoyment is not the subject of an account of profits, but that the right to such an account arises only where the tenant for life has disposed of the materials and received the profits."

Where an account of equitable waste committed by a tenant for life was directed to be taken against his executors, which it was found impossible to take accurately, and the Master had arbitrarily charged the executors, his report was supported upon the general principle that where a wrong had been committed the wrong-doer must suffer from the impossibility of accurately ascertaining the amount of the damage: *The Duke of Leeds* v. *The Earl of Amherst*, 20 Beav. 239.

As to waste by tenants in common.]—As each tenant in common has a right to "enjoy as he pleases," and may, moreover, obtain a decree for a partition, the Court will not in general grant an injunction to restrain any of them from committing either ordinary (*Goodwyn* v. *Spray*, Dick. 667; *Arthur* v. *Lamb*, 2 Dr. & Sm. 428) or equitable (*Hole* v. *Thomas*, 7 Ves. 589; *Twort* v. *Twort*, 16

Ves. 132) waste, or from working coal mines (*Job* v. *Potton*, 20 L. R. Eq. 84), but it will interfere between them to prevent malicious or destructive waste; as, for instance, "against cutting saplings and any timber trees or underwood at unseasonable times:" *Hole* v. *Thomas*, 7 Ves. 589, 590; see also *Clegg* v. *Clegg*, 3 Giff. 322, 336.

Under special circumstances, however, the Court has restrained a tenant in common from committing ordinary waste. Thus, where the parties interested were only *equitable tenants* in common, and the tenant in common who was committing the waste not only was not entitled to the possession, as the legal estate was vested in a trustee, but was also insolvent and unable to pay to his co-tenants their shares of the money to be produced by the sale, Lord *Thurlow*, C., granted an injunction restraining waste: *Smallman* v. *Onions*, 3 Bro. C. C. 621. So where one of two tenants in common was in occupation of the land as tenant to the other, Lord *Eldon*, C., granted an injunction restraining him from committing waste, "stating expressly in the order that he was occupying tenant to the plaintiff; and restraining him from committing any waste upon the premises, which he held as such occupying tenant:" *Twort* v. *Twort*, 16 Ves. 128, 132.

After a decree has been made in a suit for partition the Court has jurisdiction to restrain a tenant in common in possession not only from destroying (*Wright* v. *Atkyns*, 1 V. & B. 313), but also from wasting the property. *Ib.* But the Court will not restrain a tenant in common, bound by no express contract of tenancy, from selling hay and turnips off the soil after a decree for partition (*Bailey* v. *Hobson*, 5 L. R. Ch. App. 180), as the relation of landlord and tenant cannot be implied by mere occupation of one tenant in common: *M'Mahon* v. *Burchell*, 2 Ph. 127; *Henderson* v. *Eason*, 2 Ph. 308; *Bailey* v. *Hobson*, 5 L. R. Ch. App. 180.

To whom timber severed by tempest or waste belongs.]—As a general rule where by act of God, as a tempest, or by act of man as by a trespasser, or by waste of tenants, things are severed from the inheritance, while a tenant for life *impeachable for waste* is in possession, whether they are materials of a house, timber, or the produce of mines, they will become at once the property of the owner of the first estate of inheritance in esse, whether in fee, or tail (*Uvedall* v. *Uvedall*, 2 Roll. Ab. 119), even although there may be an intervening estate of freehold in a tenant for life without impeachment of waste: *Pigot* v. *Bullock*, 1 Ves. jun. 484; *Gent* v. *Harrison*, Johns. 517, 524.

The result is the same where

the severance takes place by the act of the tenant for life impeachable for waste himself without collusion with the owner of the inheritance: *Honywood* v. *Honywood*, 18 L. R. Eq. 311. Lord *Romilly*, however, appears to have been of opinion that in such cases the produce of timber should be laid out in the purchase of stock, and the interest of the fund paid to the successive tenants for life: 15 Beav. 7; *Bateman* v. *Hotchkin*, 31 Beav. 486. And in a recent case he treated it as doubtful whether the presumptive owner of the inheritance would take the produce of the waste of a legal tenant for life without collusion to the detriment of the heir apparent afterwards coming into esse. See *Bagot* v. *Bagot*, 32 Beav. 523. There Sir *John Romilly*, M. R., says, "I by no means assent to the doctrine supposed to be laid down by some of the cases, but as I conceive erroneously so supposed, that if an estate be limited to several persons for life, in succession, with several successive estates tail to their first and other sons in succession, and the first tenant for life commits waste without collusion with any one, the money arising from the sale of the inheritance wasted would belong to the eldest son of the last tenant for life, because he happened to be the only tenant in tail then in existence, and that he could thereby deprive all the future sons of the prior tenants for life, who should be afterwards born, of the inheritance settled on them. If the prior tenant for life could do this, as to a portion, the principle would equally apply to the whole, and he might, provided there was no collusion with the tenant in tail in esse, give an estate or a valuable part of it to a remote descendant, to the exclusion of many children, who, in the ordinary course of nature, would afterwards come into existence. I do not think that this proposition is intended to be laid down in any of the cases referred to, and I am unwilling to do anything which might lead to the supposition that I considered this to be the law."

These opinions of Lord *Romilly* are entirely opposed to the law as laid down by Lord *Hardwicke* in the principal case.

A tenant for life, however, is entitled to have the benefit arising from the sale of all such trees thrown down by the wind as he would be entitled to cut himself: *Bateman* v. *Hotchkin*, 31 Beav. 486; *Bagot* v. *Bagot*, 32 Beav. 509, 518.

By analogy to the decisions in cases of legal waste, if a tenant for life, *unimpeachable for waste* (*Rolt* v. *Lord Somerville*, 2 Eq. Ca. Ab. 759; *Marquis of Ormond* v. *Kynnersley*, or *Butler* v. *Kynnersley*, 7 L. J. O. S. (Ch.) 150; 8 L. J. O. S. (Ch.) 67; *Wellesley* v. *Wellesley*, 6 Sim. 497;

Lushington v. *Boldero*, 15 Beav. 1), or his assignees in bankruptcy (*Lushington* v. *Boldero*, 15 Beav. 1); *Duke of Leeds* v. *Amherst*, 2 Ph. 217, should fell *ornamental timber*, the proceeds will belong to the person having the first vested estate of inheritance; and parties having intervening estates for life have no right to an account of the timber so cut, or to have such proceeds invested upon the same trusts with the lands.

In *Lushington* v. *Boldero*, 13 Beav. 418, however, the Court refused to allow a fund arising from equitable waste to be paid to a son of a tenant for life in remainder, who, subject to the death of the first tenant for life, without issue, and the life interest of his father, was entitled to the inheritance as tenant in tail. The grounds for this decision appear to have been that the point in the cause could not be decided in the absence of any of the parties interested, and as it could not be said, that the issue of the first tenant for life had no possible interest in the fund during the life of the first tenant for life, the case was not ripe for decision.

In a recent case, moreover, there is a dictum of Sir *G. Jessel*, M. R., to the effect that where ornamental trees, or trees which could not otherwise be cut down by a tenant for life unimpeachable for waste, are cut down, the proceeds ought to be invested so as to follow the uses of the settlement, that is to say, to go along with the estate according to the settlement. See *Honywood* v. *Honywood*, 18 L. R. Eq. 311.

Although this course is most consistent with the principles of Equity, it is presumed, that until the decision of Lord *Lyndhurst*, in the *Marquis of Ormond* v. *Kynnersley*, 7 L. J. O. S. (Ch.) 15, is overruled by a Court of superior jurisdiction, it must be considered to be law.

There is, however, a most important exception to the general rule where timber has been cut down by tenant for years, or tenant for life impeachable for waste, *in collusion* with the first owner of the inheritance; for in such a case equity, as in the principal case, has interfered and has prevented such owner of the inheritance from getting any benefit by ordering the fund arising from the sale of the timber to be invested so as to follow the uses of the settlement of the land from which the timber was severed, or if, as in the principal case, a prior owner of the inheritance subsequently came into existence, will order the fund to be paid to him.

Where, moreover, the tenant for life of land has in himself the next existent estate of inheritance, subject to intermediate contingent remainders, he will not be allowed to take advantage of his own wrong in cutting down timber, but the Court will preserve it for the benefit of the con-

tingent remainder-men: *Williams* v. *Duke of Bolton*, 3 P. Wms. 268, cited in note by Mr. Cox; *Powlett* v. *The Duchess of Bolton*, 3 Ves. 374; *Marquis of Ormond* v. *Kynnersley*, 7 L. R. Ch. 150, 154, 155; *Bagot* v. *Bagot*, 32 Beav. 509; *Seagram* v. *Knight*, 2 L. R. Ch. App. 628.

But it seems the Court will not interfere unless it is satisfied that the defendant in his character of owner of the next existent inheritance, is colluding with himself in his character of tenant for life, in such a manner, as if there had been two distinct persons, the Court would have interfered upon the ground of fraud and collusion. See *Birch-Wolfe* v. *Wolfe*, 9 L. R. Eq. 683, 691. There it was shown that the tenant for life, who was also owner of the first vested estate of inheritance, had laid out sums in permanent improvements on the estate at least equal to the value of the amount realised by the acts of waste, which were themselves of a trivial character. The bill was dismissed by *James*, V.-C., who observed, "It would, in my judgment, be monstrous to say that a tenant in remainder, allowing a tenant for life to cut down timber in consideration and upon condition of the tenant for life doing these things for the benefit of the estate, was guilty of any fraudulent collusion which would induce this Court to extend this somewhat extraordinary jurisdiction to him; and if there would have been no ground for the interference of this Court in the case which I have supposed of tenant for life and in remainder, I cannot put the case higher when it is the same individual who is doing the same thing in his double character with regard to the estate."

And where the executor of a deceased tenant for life, who was also ultimate remainder-man in fee, admitted having received the proceeds of certain timber cut, by his testator, he was allowed, in the account to be taken against him, to take credit for the sums laid out by his testator in permanent improvements: *Birch-Wolfe* v. *Birch*, 9 L. R. Eq. 683.

Produce of timber ordered by the Court to be felled how dealt with.] —Where a tenant for life impeachable for waste, is in possession, the Court will order trees in a state of decay, or the standing of which is injurious to others, but not such as are merely ripe, unless they were injuring the growth of other timber (*Seagram* v. *Knight*, 2 L. R. Ch. App. 628; 3 L. R. Eq. 398; *Hussey* v. *Hussey*, 5 Madd. 44; *Bewick* v. *Whitfield*, 3 P. Wms. 267; but see *Ferrand* v. *Wilson*, 4 Hare, 344), to be felled, upon the ground, that the interest of the succession requires it, and will direct the interest of the proceeds to be paid to the tenant for life, though im-

peachable for waste (see *Tooker* v. *Annesley*, 5 Sim. 235, and cases there cited; *Tollemache* v. *Tollemache*, 1 Hare, 456; *Ferrand* v. *Wilson*, 4 Hare, 381; *Honywood* v. *Honywood*, 18 L. R. Eq. 311): a dowress being entitled to one-third of the income (*Bishop* v. *Bishop*, 5 Jur. 931; 10 L. J. N. S. Ch. 302; *Dickin* v. *Hamer*, 1 Drew. & Sm. 284, in which case the right of a dowress in mines opened after her husband's death was discussed but not determined); and the capital to be transferred to the first owner of the inheritance, or the first owner for life, without impeachment of waste (*Waldo* v. *Waldo*, 12 Sim. 107; *Phillips* v. *Barlow*, 14 Sim. 263); and as the timber-money will be considered as realty, on the death of a tenant in fee first owner of the inheritance, if he has done nothing to convert it into personalty, his heir will be entitled to it in preference to his personal representatives: *Field* v. *Brown*, 27 Beav. 90.

The rule is the same where a trustee has felled timber and the Court has adopted his act: *Waldo* v. *Waldo*, 12 Sim. 107, 112; *Gent* v. *Harrison*, Johns. 517, 523; *Earl Cowley* v. *Wellesley*, 1 L. R. Eq. 656; 35 Beav. 635; *Seagram* v. *Knight*, 2 L. R. Ch. App. 630. But the produce of the sale of underwood, timber cut periodically, and gravel where the pits had been worked before, ought to be paid by the trustees to the tenant for life, though impeachable for waste, as part of the income of the estate: *Earl Cowley* v. *Wellesley*, 1 L. R. Eq. 656. As to turf, see *Harris* v. *Evans*, 26 L. T. Rep. (N. S.), 827; 20 W. R. (V. C. B.), 999.

The Court will never adopt the act of a tenant for life impeachable for waste, who has taken upon himself to cut and sell timber without authority, for he does this at his peril, and he can never be permitted to derive any advantage from his own wrongful act: *Seagram* v. *Knight*, 2 L. R. Ch. App. 632; *Williams* v. *Duke of Bolton*, 3 P. Wms. 268 n.

If the Court were to order *ornamental* timber to be cut, as for instance, if in consequence of its proximity to a house, it causes it to be unhealthy, it is presumed that by analogy to the cases where ordinary timber is felled by the order of the Court, the Court would direct the interest to be paid to each tenant for life in succession, and the capital to the first owner of the inheritance, or the first tenant for life without impeachment of waste. See *Lord Lovat* v. *The Duchess of Leeds*, 2 Drew. & Sm. 75.

The Court of Chancery has also power under the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120) to order the sale of any timber (*not being ornamental timber*) growing on any settled estates (s. 11), and all monies to be raised on any sale

effected under the authority of the Act, may, if the Court shall think fit, be paid to any trustees of whom it shall approve, or otherwise shall be paid into the Bank of England or Ireland, as the case may be, to the account of the Accountant-General of the Court of Chancery, *Ex parte* the applicant in the matter of the Act, and in either case such money shall be applied as the Court shall from time to time direct to some one or more of the following purposes, namely:—the purchase or redemption of the land-tax, or the discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid; or, affecting any other hereditaments subject to the same uses or trusts; or the purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or the payment to any person becoming absolutely entitled; s. 23.

Remedy for waste when and how barred.]—Where a tenant for life impeachable for waste fells timber, the act being tortious, the remainder-man having the inheritance might either have brought an action of trover for the trees, which became his property from the moment they were felled, or an action for money had and received for the produce of the sale, or he might have instituted a suit in equity for an injunction and an account. The Statute of Limitations would, however, if the owner of the inheritance were not under disabilities, begin to run from the time when the timber was felled, and after the expiration of six years his remedy would be barred: *Seagram* v. *Knight*, 2 L. R. Ch. App. 628; *Higginbotham* v. *Hawkins*, 7 L. R. Ch. App. 676.

If, however, the owner of the inheritance were an infant, time would only begin to run from the day he attained twenty-one years of age (*Seagram* v. *Knight*, 2 L. R. Ch. App. 628, 632), and if the tenant for life who had committed waste became his administrator the running of the statute would be suspended during the administration: *Seagram* v. *Knight*, 2 L. R. Ch. App. 628, 632.

A claim in equity by a subsequent tenant for life against the estate of a deceased tenant for life who was also owner of the first vested estate of inheritance, for acts of waste committed by him when tenant for life, only arises at his death, because there was nobody before that time entitled to bring an action in respect of the wrong; but the claim will be barred by the Statute of Limitations (3 & 4 Will. 4, c. 27), if not made within six years from that date: *Birch-Wolfe* v. *Birch*, 9 L. R. Eq. 683.

It has been held that where *equitable waste* had been committed by a tenant for life, time did not

begin to run against the tenant in tail in remainder until he came into possession upon the death of the tenant for life, when the statutory rule which gives to him twenty years from the time when his title accrues in possession for bringing an action or suit for the property, was applicable to a claim for compensation for equitable waste as well as to a claim to the land itself. See *Duke of Leeds* v. *Earl of Amherst*, 2 Ph. 117; there the plaintiff's father, while in possession of the family estates as tenant for life, in the year 1808 pulled down an ancient family mansion and cut a quantity of ornamental timber in the park. In 1838 the Duke died. Shortly afterwards a bill was filed by the plaintiff against the trustees and the parties beneficially interested under the late Duke's will. Lord *Cottenham*, C., affirming the decision of Sir *L. Shadwell*, V.-C., decreed an account of equitable waste against the estate of the tenant for life, although thirty-eight years had elapsed since the waste was committed, inasmuch as the title of the remainder-man had accrued within twenty years before the filing of the bill. "The second, third, fourth, and fifth sections of the Statute of Limitations (3 & 4 Will. 4, c. 27)," said his Lordship, "all apply more or less to the subject, and they all give to the tenant in tail his remedy from the time at which his estate vests in possession. Indeed, whether this case be considered as within the statute, or whether it is to be governed by the rule, that equity follows the law, it would be strange if, where an act of forfeiture has been committed by tenant for life, the tenant in tail is not bound to enter for the forfeiture, but may have twenty years from the time when his own estate vests in possession, and yet the moment you convert a legal right into an equitable right, that is to say, the moment you divert part of the estate from its proper purpose by an act of equitable waste, the tenant in tail should be barred by the lapse of twenty years from the time when the waste was committed. If equity is to follow the law, this Court is bound to adopt the rule which the statute has laid down, and to allow the same time for making a claim of this kind, which the statute gives, for making a claim to the land itself."

This case has, however, been disapproved of. See *Morris* v. *Morris*, 4 Jur. N. S. 964; and see now The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57).

In a case where a tenant for life in remainder filed a bill against the representatives of a prior tenant for life who had been dead nearly twenty years, seeking an account for timber improperly felled by him, Lord *Romilly* dismissed the bill with costs on account of the delay: *Harcourt* v. *White*, 28 Beav. 303. It is clear,

however, according to the authorities before noticed, that the claim of the plaintiff ought to have been considered as barred in six years from the death of the prior tenant for life.

It seems, however, that where a tenant for life impeachable for waste fells timber without authority, and invests the produce of the timber, and treats it as a trust fund, in which case a trust would arise, then he would have constituted himself a trustee for the persons entitled to the estate, and no time will be a bar to the right of recovery against him: *Seagram* v. *Knight*, 3 L. R. Eq. 402.

After long delay in taking proceedings against a tenant for life for the waste, the Court will endeavour to deal liberally towards him: *Bagot* v. *Bagot*, 32 Beav. 509.

As to acquiescence in waste, and the release or abandonment of a right in respect thereof, see *Duke of Leeds* v. *Amherst*, 2 Ph. 117, 123, 124, 125; *Gresley* v. *Mousley*, 10 W. R. (L. J.), 222.

LESTER [or LYSTER] *v.* FOXCROFT AND OTHERS.

April 7th, 1701.

[REPORTED COLLES'S P. C. 108.]

S. C., cited 2 Vern. 456, nom. *Foxcroft* v. *Lister*; Gilb. Rep. 4; Prec. Ch. 519, 526, nom. *Leicester* v. *Foxcroft*.

PART PERFORMANCE OF A PAROL CONTRACT RESPECTING LAND.]—*Specific performance of a parol agreement to grant a lease decreed, notwithstanding the Statute of Frauds, after acts of part-performance on the part of the lessee by pulling down an old house, and building new houses according to the terms of the agreement.*

THE appellant stated, that Isaac Foxcroft was seised in fee of a part of an ancient messuage called Wildhouse, in the parish of St. Giles's-in-the-Fields, in the county of Middlesex, and possessed of other part thereof for a long term of years, and agreed with several builders to pull down parts thereof, and build new houses thereon; and about 25th March, 1695, proposed to make such agreement for part of the said house with appellant, and promised to assist him with money without interest, in case he should want it to finish the building; and it was *particularly agreed between them, that appellant should at his own cost pull down a certain part of the messuage, and build thereon fourteen or more good messuages; and that Foxcroft should, in consideration thereof, lease the said part to appellant*, from Michaelmas, 1695, for ninety-nine years, at a pepper-corn for the first year, and 150*l.* yearly rent for the last ninety-eight years.

At the time of making such agreement, *there was no memorandum or note thereof in writing; but in performance of the agreement* appellant entered into that part of the messuage, and, at his own cost pulled down the same, and built several new houses thereon (the whole fourteen

being almost finished), and therein disbursed several thousand pounds—about 2000*l.* his own money—and several sums borrowed from Foxcroft upon his own securities, yet unsatisfied, and was all along in possession, and acted as sole proprietor and owner, and was acknowledged as such by Foxcroft, who frequently declared that he had only a ground rent, and that appellant was the landlord; and as any of the new houses were finished, appellant demised the same in his own name, received the rents, and Foxcroft never received nor claimed any part thereof.

About August, 1698, Foxcroft (being then ill of the sickness whereof he died) made his will, and his daughter, Elizabeth Foxcroft, sole executrix; and devised to his second son, Isaac Foxcroft, his heirs and executors, all his estate in the said ancient messuage called Wildhouse; and if he died under twenty-one, to his eldest son Henry Foxcroft, his daughter Elizabeth, and Benjamin Whichcott, and appointed Francis Nicholson guardian of his son Isaac, with power to let and set for such time during his minority. And immediately after making the said will, he delivered it to appellant's wife, to let the appellant see there was nothing therein inconsistent with his said agreement; and ordered her to get a lease prepared speedily according to the agreement; and delivered to her two building leases executed by him, in pursuance of like agreements with others, as precedents to have appellant's lease drawn by; and appellant accordingly caused the leases to be prepared, bearing date about the time of the said agreement, and brought two parts thereof to Foxcroft to be executed, who caused both of them to be read to him, and approved of the same; but observed that there was a mistake in one part thereof in his name, John being put for Isaac, and disliked that the sealing and delivery was not endorsed on the back thereof; and thereupon ordered appellant to get the mistake amended, and the endorsement made by the same hand that engrossed the deeds, and then to bring them again, and he would execute them; and often expressed his dis-

satisfaction that they were not brought back for execution as soon as he expected, and was under great uneasiness of mind lest he should die before it was done.

And appellant, a few days before the death of Foxcroft, brought the deeds, so amended, to his house, to have them so executed as he had directed, but respondent refused to let appellant see or speak with Foxcroft, and used several indirect and unfair methods to prevent him from executing the said leases, by means whereof he died without executing them; and since his death, respondents refused to execute leases, according to the agreement, whereon appellant, in Hilary Term, 1698, exhibited his bill in Chancery for a specific execution of the agreement, and the cause being heard, 6th March, 1700, the Lord Keeper (*a*) declared that there was no sufficient proof of the said agreement, and ordered appellant's bill to stand dismissed without any relief; *which decree appellant insisted ought to be reversed, for that the agreement was sufficiently proved; and though not originally reduced into writing, occasioned by the entire confidence the parties had in each other, yet the same having been, at appellant's great expense, so far executed on his part, there ought to be a reciprocal performance of it on the other part;* and the rather so, as the terms of the agreement were reduced to a certainty, by the lease prepared by direction of the lessor, and the execution thereof prevented by the unfair practices of the respondents, or some of them.

(*a*) Sir Nathan Wright.

J. Jekyll, Hen. Poley, counsel for the appellant.

The respondents, in affirmance of the decree, alleged, that Isaac Foxcroft made his will, dated 30th August, 1698, of the import stated by appellant, and died 15th September following; and, in Hilary Term t. n next, appellant filed his bill against respondents for a specific execution of a parol agreement expended; and that respondents had answered, that they knew not that appellant was any ways concerned in pulling down and rebuilding the premises, otherwise than as agent or servant for the testator, at whose proper charge and expense they insisted the work was done; and denied that any such agreement for a lease was ever made by the testator to the appellant;

and showed that the appellant was greatly indebted to the testator before any building began, and that the testator had no other way to obtain his debt but by employing him in work; and that the testator, though of perfect understanding, had not taken any notice of such supposed agreement in his will; and that the appellant had not required a performance thereof, for near three years and a half after, nor until so near an approach of the testator's death; and showed, further, that three of the appellant's witnesses were considerable legatees in the testator's will, and that their evidence tended to enlarge the personal estate for their own benefit; and finally, insisted, that nothing of such pretended agreement being in writing, and signed by either of the parties, the Statute made for preventing frauds and perjuries (29 Car. 2, c. 3), was a full bar to the appellant's pretences.

Die Lunæ, 7° Aprilis, 1701. Upon hearing counsel on this appeal, it was ordered and adjudged by the Lords, that the decretal order of dismission complained of should be reversed, and that the respondent, Isaac Foxcroft, or such other of the respondents to whom the estate in question should come, by virtue of his father's will, should, when he or they should be of age, execute to the appellant Lyster, his executors, &c., such a lease of the premises in question, as was prepared and approved of by the said Isaac Foxcroft, the father, before his death, and that the appellant and his assigns should, in the meantime, hold and enjoy the same, under the covenants and agreements in the said intended lease contained; discharged of all incumbrances done by said Isaac Foxcroft, or any claiming under him.—Lords' Journ. vol. xvi., p. 644.

John Clapham, counsel for respondents.

"The Statute of Frauds," observes Lord *Redesdale*, "says, that no action or suit shall be maintained on an agreement relating to lands, which is not in writing, signed by the party to be charged with it; and yet the Court is in the daily habit of relieving, where the party seeking relief has been put into a situation which makes it against

conscience in the other party to insist on the want of writing so signed, as a bar to his relief. The first case (apparently) of this kind was *Foxcraft* v. *Lyster*, cited 2 Vern. 456, and reported in Colles's Parl. Cas. 108. That case was decided on a principle acted upon in courts of law, though not applicable by the modes of proceeding in a court of law to the particular case. It was against conscience to suffer the party who had entered and expended his money on the faith of a parol agreement to be treated as a trespasser, and the other party to enjoy the advantage of the money he had laid out. At law, fraud destroys rights. If I mix my corn with another's, he takes all; but, if I induce another to mix his corn with mine, I cannot then insist on having the whole. The law in that case does not give me his corn. The case of *Foxcraft* v. *Lyster*, therefore, I conceive, was decided on clear principle; though, whether the cases founded on that case have been all so well considered, I will not take upon me to say. But it appears, from these cases, that courts of equity have decided on equitable grounds, in contradiction to the positive enactment of the Statute of Frauds, though their proceedings are in words included in it:" *Bond* v. *Hopkins*, 1 S. & L. 433. See also *Clinan* v. *Cooke*, 1 S. & L. 41; *Duke of Leeds* v. *The Earl of Amherst*, 20 Beav. 239; *Dillwyn* v. *Llewellyn*, 10 W. R. (L. C.) 742.

The principle on which the Court proceeds in these cases is this, that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud.—Per Lord *Westbury*, 4 L. R. Ho. Lo. 97. See, also, *Haigh* v. *Kaye*, 7 L. R. Ch. App. 469.

Acts merely introductory or ancillary to an agreement, although attended with expense, are not considered acts of part performance. Thus, the delivery of abstracts of title, giving orders for conveyances to be drawn and engrossed, going to view an estate, putting a deed into a solicitor's hands to prepare a conveyance, employing surveyors to value timber on an estate, or fixing upon persons as appraisers to value stock, appointing a person to make a valuation of the land, registering deeds, and similar acts of an equivocal nature, are not sufficient acts of part performance to take a parol contract out of the statute: *Hawkins* v. *Holmes*, 1 P. Wms. 770; *Pembroke* v. *Thorpe*, 3 Swanst. 437, n.; *Clerk* v. *Wright*,

1 Atk. 12; *Whitbread* v. *Brockhurst*, 1 Bro. C. C. 412; *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559; *Redding* v. *Wilkes*, 3 Bro. C. C. 400; *Cooke* v. *Tombs*, 2 Anst. 420; *Cooth* v. *Jackson*, 6 Ves. 17, 41; *Stokes* v. *Moore*, 1 Cox, 219; *Frame* v. *Dawson*, 14 Ves. 386; *Phillips* v. *Edwards*, 33 Beav. 440.

The question has been raised but not decided whether the signature of a written document is an act of part performance of a parol agreement. See *Jervis* v. *Berridge*, 8 L. R. Ch. App. 351, 360. See, also, *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138.

Payment of part (*Clinan* v. *Cooke*, 1 S. & L. 40; *Seagood* v. *Meale*, Prec. Ch. 560; *O'Herlihy* v. *Hedges*, 1 S. & L. 123), or even of *all* the purchase-money will not be considered an act of part performance to take a parol contract out of the Statute of Frauds: *Hughes* v. *Morris*, 2 De Gex, Mac. & G. 356.

But admission into possession having unequivocal reference to the contract, has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorise an inquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure: (*Morphett* v. *Jones*, 1 Swanst. 181; *Borrett* v. *Gomeserra*, Bunb. 94; *Earl of Aylesford's case*, 2 Stra. 783; *Lacon* v. *Mertins*, 3 Atk. 1; *Wells* v. *Stradling*, 3 Ves. 381; *Bowers* v. *Cator*, 4 Ves. 91; *Gregory* v. *Mighell*, 18 Ves. 328; *Kine* v. *Balfe*, 2 Ball & B. 343; *Pain* v. *Coombs*, 3 Sm. & Giff. 449, 1 De G. & Jo. 34; *Shillibeer* v. *Jarvis*, 8 De G. Ma. & G. 79; *Wilson* v. *West Hartlepool Railway Company*, 34 Beav. 187, 2 De G. Jo. & Sm. 475; *Coles* v. *Pilkington*, 19 L. R. Eq. 174); à fortiori where, as in *Lester* v. *Foxcroft*, the person seeking specific performance has laid out money in building or in improvements. See *Floyd* v. *Buckland*, 2 Freem. 268; *Mortimer* v. *Orchard*, 2 Ves. jun. 243; *Toole* v. *Medlicott*, 1 Ball & B. 393; *Wheeler* v. *D'Esterre*, 2 Dow, 359; *Norris* v. *Jackson*, 10 W. R. (V. C. S.) 228; *Crook* v. *Corporation of Seaford*, 6 L. R. Ch. App. 551.

But in all these cases, in order to amount to part performance, the acts must be unequivocally referable to the agreement; and the ground, on which Courts of equity have allowed such acts to exclude the operation of the statute, is fraud. A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed. That is the principle,

but the acts must be referable to the contract: *Morphett* v. *Jones*, 1 Swanst. 181; *Attorney-General* v. *Day*, 1 Ves. 221; *Walker* v. *Walker*, 2 Atk. 100; *Buckmaster* v. *Harrop*, 7 Ves. 346; *Whitbread* v. *Brockhurst*, 1 Bro. C. C. 417; *S. C.*, 2 V. & B. 154, n.; *Hawkins* v. *Holmes*, 1 P. Wms. 770; *Wills* v. *Stradling*, 3 Ves. 378; *Meynell* v. *Surtees*, 3 Sm. & Giff. 101; *Price* v. *Salusbury*, 32 Beav. 446; *Hollis* v. *Edwards*, 1 Vern. 159, and Mr. Raithby's note; *Farrall* v. *Davenport*, 3 Giff. 363. "I take it," observes Lord *Redesdale*, "that nothing is to be considered as a part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed; for instance, if, upon a parol agreement, a man is admitted into possession, he is made a trespasser if there be no agreement. This is put strongly in the case of *Lester* v. *Foxcroft*: there the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrongdoer, and to account for the rents and profits; and why? Because he entered in pursuance of an agreement. Then, for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible; and, if it was admissible for such purpose, there is no reason why it should not be admissible throughout. That, I apprehend, is the ground on which Courts of equity have proceeded, in permitting part performance of an agreement to be a ground for avoiding the statute; and I take it, therefore, that nothing is to be considered as part performance which is not of that nature. Payment of money is not part performance, for it may be repaid; and then the parties will be just as they were before, especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought; for in the case of *Lester* v. *Foxcroft*, which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent:" *Clinan* v. *Cooke*, 1 S. & L. 41.

Moreover, it is essential that possession should be delivered according to the contract, and not obtained wrongfully, otherwise it will not be considered as an act of part performance. Thus, in *Cole* v. *White*, before Lord *Camden*, in 1767 (cited 1 Bro. C. C. 409), where there was an agreement for a lease for four years, and the bill charged that possession was given, the defendant pleaded the statute, and by his answer *denied that possession was delivered in part performance, and swore that the plaintiff obtained it wrongfully.* The plea was allowed, and Lord *Camden* added that the giving

instructions for a lease could not make part of the case as a part performance.

In *Millard* v. *Harvey*, 13 W. R. (M. R.) 125, 34 Beav. 237, the plaintiff's wife, without his knowledge, paid 150*l.* to the defendant with the desire of purchasing a field for the plaintiff. The defendant refused to sell, but kept the money and paid no interest. A few days afterwards he told the plaintiff he might have the field to put his horse in. The plaintiff occupied it for ten years without paying any rent, and in ignorance of what his wife had done. It was held by Sir *John Romilly*, M. R., that as there was a contract with the wife as agent for her husband, subsequently adopted by him, and accompanied by possession for ten years, the Court ought to decree specific performance.

Where subsequently to the institution of a suit for specific performance of a parol agreement, upon the ground of part performance, the plaintiff has obtained by Act of Parliament the means of quieting his possession, without further assistance, from a Court of equity, inasmuch as the jurisdiction in cases of specific performance is discretionary, his right to a decree will be materially affected *where* it depends on the principle of protecting the possession : *Meynell* v. *Surtees*, 3 Sm. & Giff. 101, 116.

As between landlord and tenant, it is to be observed that the mere *continuance* in possession by the tenant is not alone of itself an act of part performance of a parol agreement. In *Wills* v. *Stradling*, 3 Ves. 381, Lord *Loughborough*, C., observes, "As to the possession in the case of a tenant, who of course continues in possession unless he has notice to quit, the mere fact of his continuance in possession (for quo animo he continued in possession) would not weigh. The delivery of possession by a person having possession, to the person claiming under the agreement, is a strong and marked circumstance; but the mere holding over by the tenant, which he will do, of course, if he has no notice to quit, would not of itself take the case out of the statute, or even call for an answer." See, also, *Smith* v. *Turner*, Prec. Ch. 561; *Savage* v. *Carroll*, 1 Ball & B. 265; *Morphett* v. *Jones*, 1 Swanst. 181.

But in a case where there was a payment of an increased rent referable to the agreement, Lord *Loughborough* ordered the plea of the Statute of Frauds to stand for an answer, with liberty to except. "Payment of additional rent," he observed, "per se, is an equivocal circumstance, it is true. It may be that he shall hold over from year to year, the lease being expired. There may be other inducements. But how stands the averment upon this plea? It is, that the landlord accepted the additional rent upon

the foot of the agreement. Then the acceptance upon the ground of the agreement, which is the averment upon this plea, is not equivocal at all. It is incumbent upon the defendant to say, whether it was merely accepted upon a holding from year to year, or any other ground. How would it stand at law? Suppose this averment was proved by parol evidence, it would be a good lease for three years, and would defend the tenant against an ejectment brought within the three first years. *Charlewood* v. *The Duke of Bedford* (1 Atk. 497), which finally turned upon the want of authority in the steward, is an authority upon which, under the circumstances alleged in this bill, the benefit of the plea ought to be saved to the hearing:" *Wills* v. *Stradling*, 3 Ves. 378; and see *Lord Desart* v. *Goddard*, 1 Wallis Rep. by Lyne, 347; *Shepheard* v. *Walker*, 20 L. R. Eq. 659.

In a recent case the payment of an increased rent by a tenant in possession has been held to be an act of part performance: *Nun* v. *Fabian*, 1 Law Rep. Ch. App. 35. And see *Clarke* v. *Reilly*, 2 I. R. C. L. (Exch.) 422; *Howe* v. *Hall*, 4 I. R. Eq. 242; *Archbold* v. *Lord Howth*, 1 I. R. C. L. 608; *Williams* v. *Evans*, 19 L. R. 557.

The laying out of money by the tenant continuing in possession, if it was part of the contract that money should be laid out, and it is one of the considerations for granting the lease (the laying out of which must be then with the privity of the landlord) it is very strong to take it out of the statute.—Per Lord *Loughborough*, C., in *Wills* v. *Stradling*, 3 Ves. 382. In *Mundy* v. *Jolliffe*, 5 My. & Cr. 167, a tenant from year to year of a farm having, at his own expense, drained the lands upon the farm, and laid down into pasture the only piece of arable land which the farm contained, and repaired the buildings, pursuant to a parol agreement for a lease, Lord *Cottenham*, C. (overruling the decision of Sir *L. Shadwell*, V.-C., reported 9 Sim. 413), upon proof of the agreement, decreed specific performance, saying, there was no doubt of the part performance. In the case of *Sutherland* v. *Briggs* (1 Hare, 26), the plaintiff was lessee of a house and other premises for a term of thirty-one years, at a rent of 60*l*., and was under a covenant to make certain improvements on the property. He was also tenant from year to year of an adjoining meadow belonging to a different proprietor, at a rent of 9*l*. The lessor of the house became the purchaser of the meadow, and by arrangement between him and the plaintiff, the improvements were extended, and part of the house was made to project over the field, and part of the field was attached to the demised premises; the plaintiff paying about half of the expense of the alterations, which far exceeded the sum he had originally covenanted to lay out, and

also signing a memorandum which the lessor drew up, whereby he agreed to pay an entire rent of 80*l.* a year for the consolidated property. It was held by Sir *James Wigram*, V.-C., that the extension of the house into the meadow, by the plaintiff, with the concurrence of his landlord, was evidence of, and was a sufficient consideration for, a contract to demise the meadow; that the act of building part of the house upon the meadow, if it was evidence of any right, was evidence of a right which affected the entire tenement, and that it could not be restricted so as to affect only the part of the meadow actually built upon; that the extension of the house, part of the demised premises, into the meadow and the increase and consolidation of the rents, were evidence that the meadow was to be held for the same term as the demised premises; and that the doctrine with regard to the mutuality of contracts had no application to such a case. "The first point," observed his Honor, "suggested rather than pressed, was, that, the plaintiff being in possession of the meadow as tenant from year to year, the expenditure upon the property did not unequivocally show that it had proceeded upon some antecedent contract with the landlord. Undoubtedly, it is, in general, necessary that an act of part performance, which is to take a case out of the Statute of Frauds, should unequivocally demonstrate the existence of some contract to which it must be referred: *Morphett* v. *Jones*, 1 Swanst. 172. But if the act of extending the house, in which the tenant had an interest for a term of years, into the meadow, with the landlord's consent, be not evidence of a contract between them, I know not what act on the part of a tenant in possession of property could possibly be so considered. Circumstances much less stringent have been deemed sufficient (1 Sugd. V. & P. p. 20, 10th ed.); and if the case of *Mundy* v. *Jolliffe* (5 My. & Cr. 167), in which Lord *Cottenham* differed from the Vice-Chancellor of England, may be considered as correctly illustrating the rule of this Court as to the acts of part performance which will take a case out of the statute, the alterations of the garden-fence and making the plantation in the meadow, would be sufficient. In that case, the expenditure by the tenant was in draining the land, and the Court decreed Mr. Jolliffe to grant him a lease upon the promise of which it was said the expense of draining had been incurred.

"It was next said, that the justice of the case would be satisfied by giving to the plaintiff so much of the meadow as the house stands upon, which the defendant offered to do. To the suggestion, that justice would be satisfied by doing this, I cannot accede; for some additional portion of the meadow would be essential to the enjoyment of the house. The rules of

this Court, however, will not permit me so to consider the case. If the acts done by the plaintiff are to be considered acts of part performance, taking the case out of the operation of the statute, the rules of the Court entitle him to prove the entire agreement which the acts relied upon were intended partly to perform. The act of building part of the house upon the meadow was an act affecting the whole tenement—namely, the meadow—and not that part of it only upon which the house stands. The case of *Mundy* v. *Jolliffe*, will apply also to this part of the present case." See, also, *Howe* v. *Hall*, 4 I. R. Eq. 242.

And the result is the same where the outlay in part performance of an agreement with the tenant is made by his sub-lessee with the assent and approval of the landlord: *Williams* v. *Evans*, 19 L. R. Eq. 547; and see *Ib.* 557, comments on *Frame* v. *Dawson*, 14 Ves. 386.

In *Parker* v. *Smith* (1 Coll. 608), the landlord of a coal set, having four tenants in partnership together holding under a lease, several years of which were unexpired, entered into a parol agreement with all four upon the surrender of the old lease to grant a new one to two of the partners—the plaintiffs,—upon the terms that the partnership should be dissolved, and that the plaintiffs should release the two retiring partners from all liability. The dissolution and release so agreed upon took place, by which the plaintiffs took upon themselves the liability which had before been shared by the four. Sir *J. L. K. Bruce*, V.-C., decreed specific performance of the agreement. "It is," said his Honor, "part of the entire agreement that the dissolution and release shall take place. They do take place. It is impossible to treat these acts otherwise than as acts of part performance, taking the case out of the Statute of Frauds."

It must, however, be borne in mind, "that part performance, to take a case out of the Statute of Frauds, always supposes a completed agreement. There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement, and by force of the agreement." Per Lord *Brougham* in *Lady Thynne* v. *Earl of Glengall*, 2 H. L. Cas. 158; *In re Thomas Ryan*, 3 I. R. Eq. 238.

The terms, moreover, of the contract must be certain and unambiguous: *Clinan* v. *Cooke*, 1 S. & L. 22; *Boardman* v. *Mostyn*, 6 Ves. 467, 470; *Symondson* v. *Tweed*, Prec. Ch. 374; *Foster* v. *Hale*, 3 Ves. 712, 713; *Savage* v. *Carroll*, 1 Ball & B. 265, 551; *S. C.*, 2 Ball & B. 451; *Tooke* v. *Medlicott*, 1 Ball & B. 404; *Lindsay* v. *Lynch*, 2 S. & L. 1; *Reynolds* v. *Waring*, 1 You. 346; *Price* v. *Assheton*, 1 Y. & C. Exch. C. 441.

Where, however, the evidence of the parties as to the terms of the contract is in some respects contradictory, specific performance will be decreed, if the Court, by directing inquiries, can collect what were the terms about which the parties differ. Thus, in *Mortimer* v. *Orchard*, 2 Ves. jun. 243, where the plaintiff had built a house, his witness proved an agreement different from that set up by the bill, and the answers stated an agreement different from both. Lord *Loughborough*, C., said, that in strictness, the bill ought to be dismissed, but, on account of the expenditure, decreed specific performance, according to the agreement admitted by the answers.

So, likewise, "in a case that came from Malton, in Yorkshire, possession having been delivered in pursuance of a parol agreement, and a dispute arising upon the terms of the agreement, Lord *Thurlow* thought proper to send it to the Master, upon the ground of the possession being delivered, to inquire what the agreement was. The difficulty there, was in ascertaining that. The Master decided as well as he could; and then the cause came before Lord *Rosslyn*, upon further directions, who certainly seemed to think Lord *Thurlow* had gone a great way, and either drove them to a compromise, or refused to go on with the decree upon the principle on which it was made.—Per Lord *Eldon*, in *Boardman* v. *Mostyn*, 6 Ves. 470, in which case his Lordship also observed, "that if it was res integra, the soundest rule would be, that, if the party leaves it uncertain, the agreement is not taken out of the statute sufficiently to admit of its being enforced." See, also, *Maudy* v. *Jolliffe*, 5 My. & Cr. 177, in which case Lord *Cottenham* says, "Courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money, or otherwise acted, in execution of the agreement. Under such circumstances, the Court will struggle to prevent such injustice from being effected; and with that object it has at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavoured to collect, if it can, what the terms of it really were." (See, also, *Laird* v. *The Birkenhead Railway Company*, Johns. 500; *Wilson* v. *The West Hartlepool Railway Company*, 34 Beav. 187; *S. C.*, 2 De G. Jo. & Sm. 475; *Oxford* v. *Provand*, 2 L. R. P. C. 135, 148; *Baumann* v. *James*, 3 L. R. Ch. App. 508.)

But if after all the evidence

that can be got, any material terms of the agreement are doubtful, the Court can make no decree (*Clinan* v. *Cooke*, 1 S. & L. 22; *Lord Ormond* v. *Anderson*, 2 Ba. & B. 237; *Wheeler* v. *D'Esterre*, 2 Dow, 359; *Blore* v. *Sutton*, 3 Mer. 237; *Monro* v. *Taylor*, 8 Hare, 51; 3 Mac. & G. 713; *Tatham* v. *Platt*, 9 Hare, 660; *Stuart* v. *The London and North Western Railway Company*, 1 De G. Mac. & G. 721; *Taylor* v. *Portington*, 7 De G. Mac. & G. 388). But it is not necessary to prove terms of the agreement which are immaterial, as, for instance, to prove a stipulation by an intended lessee to pay taxes and make necessary repairs to which, in the absence of such stipulation, he would have been liable (*Gregory* v. *Mighell*, 18 Ves. 323), or to do certain acts which have already been done: *Mundy* v. *Jolliffe*, 5 My. & Co. 167, 176.

Companies and corporations are bound equally with individuals by acts of part performance: *Wilson* v. *The West Hartlepool Railway Company*, 10 Jur. N. S. 1064; 11 Jur. N. S. 124, 13 W. R. (M. R.) 4; *Ib.* (L. J.) 361; 34 Beav. 187; 2 De G. Jo. & Sm. 475; *Steeven's Hospital* v. *Dyas*, 15 Ir. Ch. Rep. 405.

An agreement by a corporation to let land upon lease, although not under their seal, will be enforced against the corporation, where there have been acts of part performance on the part of the intended lessee: *Crook* v. *Corporation of Seaford*, 6 L. R. Ch. App. 551.

Sales by auction of land (*Blagden* v. *Bradbear*, 12 Ves. 472), except where made under a decree (*Attorney-General* v. *Day*, 1 Ves. 218), and in bankruptcy (*Ex parte Cutts*, 3 Deac. 267) are within the Statute of Frauds (29 Car. 2, c. 3). A purchaser, therefore, at an ordinary auction is not bound, unless there is some agreement in writing.

Where, however, a purchaser of land at an auction takes possession of a lot knocked down to him, and cuts down crops, which he could only do in the character of purchaser, it will be held to be a part performance of the verbal contract entered into when he bid for the lot in the auction room, and specific performance will be decreed against him (*Buckmaster* v. *Harrop*, 13 Ves. 474); but where a person has purchased two or more lots sold separately at a sale by auction, acts of part performance with regard to one lot will not make good an agreement with regard to the other lots. *Ib.*

It has been said in a recent case, that the doctrine of part performance of a parol agreement is not to be extended by the Court, and that it is inapplicable to the case where a trustee has a power to lease, at the request, in *writing*, of a married woman, which has not been made. See *Phillips* v. *Edwards*, 33 Beav. 440.

This, however, is a mere die-

tum, as there was no act of part performance in the case.

It has been laid down, however, as a general rule that a parol agreement to sell or grant a lease entered into by a tenant for life with a leasing power, coupled with a part performance by the purchaser or lessee during the life of the tenant for life, will not bind the remainderman, unless he acquiesced in the part performance and was aware of the agreement (*Blore* v. *Sutton*, 3 Mer. 237; *Morgan* v. *Milman*, 3 De G. M. & G. 24, 33; *Lowe* v. *Swift*, 2 Ball. & B. 529; *O'Fay* v. *Burke*, 8 I. Ch. R. 225), or unless, after the death of the tenant for life, the remainderman lies by and allows the purchaser or lessee to expend money in improving the estate (*Stiles* v. *Cowper*, 3 Atk. 692); and the law upon this subject is not affected by the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), nor by the Landed Property (Ireland) Improvement Act, 1860 (23 & 24 Vict. c. 153): *Hope* v. *Lord Cloncurry*, 8 I. R. Eq. 555.

A family arrangement for the division of land, although only verbal, has been carried out where there were acts of part performance by the parties interested, holding and dealing with the land in accordance with the terms of the arrangement: *Williams* v. *Williams*, 2 Dr. & Sm. 378; 2 L. R. Ch. App. 294; *Cood* v. *Cood*, 33 Beav. 314.

Although it is clear that where a parol contract is made in consideration of marriage, the subsequent marriage will not be an act of part performance so as to take the case out of the Statute of Frauds, inasmuch as the statute expressly provides that a contract in consideration of marriage shall not be binding unless it be in writing (*Dundas* v. *Dutens*, 1 Ves. Jun. 196; *Lassence* v. *Tierney*, 1 Mac. & G. 551; *Warden* v. *Jones*, 23 Beav. 487, 2 De G. & Jo. 76; *Cooper* v. *Wormald*, 7 W. R. (M. R.) 402; *Caton* v. *Caton*, 1 Law Rep. Ch. App. 137, affirmed 2 L. R. Ho. Lo. 127, reversing *S. C.* 13 W. R. (V. C. S.) 801, 34 L. J. (Ch.) 564; *M'Askie* v. *M'Cay*, 2 I. R. Eq. 447); nevertheless a parol contract may be taken out of the statute by acts of part performance independently of the marriage. Thus, in *Surcombe* v. *Pinniger*, 3 De G. M. & G. 571, a father previous to the marriage of his daughter told her intended husband that he meant to give certain leasehold property to them on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title deeds. The husband also expended money upon the property. It was held by the Lords Justices, that there had been sufficient part performance of the parol contract to take the

case out of the Statute of Frauds. "In this case," said Lord Justice *Turner*, "there is a part performance by the delivering up of possession to the husband—a fact which has been always held to change the situations and rights of the parties, and there has been considerable expenditure by him on the property. There is, therefore, here what was wanting in *Lassence* v. *Tierney*, viz. acts of part performance, besides the marriage. The difficulty in these cases is that the Statute of Frauds presents an obstacle to suing upon the agreement. But it has been held, in many cases, that if there be a written agreement after marriage in pursuance of a parol agreement before marriage, this takes the case out of the statute, so does also part performance." See also *Taylor* v. *Beech*, 1 Ves. 297; *Barkworth* v. *Young*, 4 Drew. 1; *Cooper* v. *Wormald*, 27 Beav. 266; *Ungley* v. *Ungley*, 4 Ch. D. 73.

Although marriage is not a part performance of a contract within the Statute of Frauds, nevertheless where a person marries upon the faith of representations or promises made to him for the purpose of influencing his conduct with reference to the marriage, the person making such representations or promises will be compelled in equity to make them good, not only at the instance of the person to whom they were made (*Hammersley* v. *De Biel*, 12 C. & F. 45; *S. C., nom. De Biel* v. *Thompson*, 3 Beav. 469; *Payne* v. *Mortimer*, 1 Giff. 118; 4 De G. & Jo. 447; *Alt* v. *Alt*, 4 Giff. 84; and see *Loffus* v. *Maw*, 3 Giff. 592; *Coverdale* v. *Eastwood*, 15 L. R. Eq. 121; *Coles* v. *Pilkington*, 19 L. R. Eq. 174); but also at the instance of the issue of the marriage (*Walford* v. *Gray*, 13 W. R. (V. C. S.) 335; *Ib.* (L. C.) 761). See also *Skidmore* v. *Bradford*, 8 L. R. Eq. 134.

The representation or promise must, however, be clear and absolute (*Randall* v. *Morgan*, 12 Ves. 67; and see *Maunsell* v. *White*, 1 Jo. & L. 567; *Loxley* v. *Heath*, 27 Beav. 523; 1 De G. F. & Jo. 489; *Kay* v. *Cook*, 3 Sm. & Giff. 407; *Jameson* v. *Stein*, 21 Beav. 5); and where it is contained in a lost document parol evidence is admissible as to its contents: *Gilchrist* v. *Herbert*, 26 L. T. Rep. (N. S.) 381.

A parol promise, moreover, made prior to a marriage cannot be enforced if the marriage did not take place by reason of any reliance on such promise, or if it was not acted on as a reason and consideration for the marriage: (*Goldicutt* v. *Townsend*, 28 Beav. 445; *Jameson* v. *Stein*, 21 Beav. 5); and à fortiori where it was waived by the parties: *Caton* v. *Caton*, 2 L. R. Ho. Lo. 127, 142.

And where the representation is merely of what a party intends to do, without pledging himself

to its performance, or where the promise is of such a character that the person making it refuses to enter into a contract, giving the party to whom it is made to understand that he must rely on or trust to his honour, it has been held, though with great conflict of opinion, that the Court of Chancery cannot enforce the performance of the representation or promise: *Maunsell* v. *White*, 1 Jo. & L. 539; 4 Ho. Lo. Ca. 1039; *Jorden* v. *Money*, 5 Ho. Lo. Ca. 185; *S. C., nom. Money* v. *Jorden*, 15 Beav. 372; 2 De G. Mac. & G. 318. See the remarks on this case in *Loffus* v. *Maw*, 3 Giff. 592, 604; *Prole* v. *Soady*, 2 Giff. 1; *M'Askie* v. *M'Cay*, 2 I. R. Eq. 447; *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans*, 6 L. R. Ho. Lo. 352.

Although a written contract cannot be varied by parol, a Court of equity, when there have been acts of part performance of the parol variation, will decree a specific performance of the contract, with the variation: *Anon.*, 5 Vin. Ab. 522, pl. 38.

A contract will be taken out of the Statute of Frauds where the provisions of the statute have not been complied with, in consequence of the fraud of the person against whom a decree for specific performance is sought: (*Maxwell* v. *Montacute*, Prec. Ch. 526; *Walker* v. *Walker*, 2 Atk. 98; *Joynes* v. *Statham*, 3 Atk. 389; *Whitchurch* v. *Bevis*, 2 Bro. C. C. 565; *Lincoln* v. *Wright*, 4 De G. & Jo. 16, 22; *Booth* v. *Turle*, 16 L. R. Eq. 182;) and, therefore, in the principal case, even had there been no acts of part performance of the agreement, if, as was alleged, the execution of the lease had been prevented by indirect and unfair means, there might have been sufficient grounds for the Court to have decreed a specific performance.

Lord *North* appears to have thought, although he never actually so decided, that, where it was part of the agreement that it should be put into writing, the agreement would be taken out of the Statute of Frauds. See *Hollis* v. *Whiteing* or *Edwards*, 1 Vern. 151, 159; *Leak* v. *Morrice*, 2 Ch. Ca. 135. But Lord *Thurlow*, in *Whitchurch* v. *Bevis*, where this doctrine was urged at the Bar, said, "I take that to be a single case, and to have been overruled. If you interpose the *medium of fraud*, by which the agreement is prevented from being put into writing, I agree to it; otherwise, I take Lord *North's* doctrine, 'that if it had been laid in the bill that it was part of the agreement that it should be put into writing, it would have done,' to be a single decision, and contradicted, though not expressly, yet by the current of opinions."

The principle that a statute shall not be made an instrument for covering a fraud has been illustrated by cases in which Courts of equity have not allowed

parties to profit where they have fraudulently induced another party either not to make or to refrain from altering wills, the mode of executing which was formerly regulated by the 5th & 19th sections of the Statute of Frauds (29 Car. 2, c. 3), and is now by the Wills Act (1 Vict. c. 26).

Thus, although a testator after devising an estate to another, leave a declaration of trust not executed in the mode required by the statute, the devisee will take beneficially, and may plead the statute by way of answer to the declaration (*Adlington* v. *Cann*, 3 Atk. 151) : nevertheless, where a person, knowing that a testator in making a disposition in his favour intends it to be applied for purposes other than for his own benefit, either expressly promises or by silence implies, that he will carry the testator's intentions into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a trust, and in such case the Court will not allow the devisee to set up the Statute of Frauds (29 Car. 2, c. 3), or, rather, the Statute of Wills (1 Vict. c. 26), by which the Statute of Frauds is now in this respect superseded : *Jones* v. *Badley*, 3 L. R. Ch. App. 364, per Lord *Cairns*, L. C. ; and see *Wallgrave* v. *Tebbs*, 2 K. & J. 313.

Thus, if a father devises an estate to his youngest son, who promises that if the estate be devised to him he will pay 10,000*l.* to the eldest son, the Court, upon proceedings being taken by the latter, would compel the former to discover whether that passed in parol ; and, if he acknowledged it, even praying the benefit of the Statute, he would be a trustee to the amount of 10,000*l.*; per Lord *Eldon* in *Stickland* v. *Aldridge*, 9 Ves. 519.

Upon the same principle, if the owner of an estate suffered it to descend, being informed by the heir that if it were permitted to descend, he would make a provision for his mother, wife, or other person, there is no doubt the Court would compel the heir to discover whether he did make such promise, and would hold him to be a trustee to the extent of the provisions that he agreed to make: *Stickland* v. *Aldridge*, 9 Ves. 519. See also *Harris* v. *Horwell*, Gilb. Eq. Rep. 11 ; *Scilack* v. *Harris*, 5 Vin. Ab. 521, pl. 31; *M'Cormick* v. *Grogan*, 4 L. R. Ho. Lo. 88.

It may, indeed, be laid down as a general rule that where a testator devises or bequeaths real or personal property (*Kingsman* v. *Kingsman*, 2 Vern. 559 ; *Oldam* v. *Lichford*, 2 Vern. 506; *Thynn* v. *Thynn*, 1 Vern. 296), to one who appears upon the face of the will to take beneficially, but who has agreed with the testator that he will hold a part (*Stickland* v. *Aldridge*, 9 Ves. 519), or even the whole (*Thynn* v. *Thynn*, 1 Vern. 296), of the property so devised or bequeathed to him upon a law-

ful trust in favour of some other person or persons, he will, to the extent of his engagement, be held a trustee for such person or persons: *Reech* v. *Kennigate*, Amb. 67; *S. C.* 1 Ves. 123; *Devenish* v. *Baines*, Prec. Ch. 3; *Chamberlaine* v. *Chamberlaine*, 2 Eq. Ca. Ab. 43; *Nab* v. *Nab*, 10 Mod. 404; *Strode* v. *Winchester*, 1 Dick. 397; *Marriot* v. *Marriot*, 1 Stra. 672; *Barrow* v. *Greenough*, 3 Ves. 152; *Gray* v. *Gray*, 11 Ir. Ch. Rep. 218; *Attorney-General* v. *Dillon*, 13 Ir. Ch. Rep. 127; *Irvine* v. *Sullivan*, 8 L. R. Eq. 673; *Norris* v. *Frazer*, 15 L. R. Eq. 318; *M'Cormick* v. *Grogan*, 4 L. R. Eq. 88.

In thus acting the Court does not violate the spirit of the statutes; but for the same end, namely the *prevention of fraud*, it engrafts the trusts on the devise by admitting evidence which the statutes would in terms exclude, in order to prevent a devisee from applying property to a purpose foreign to that for which he undertook to hold it: *Jones* v. *Badley*, 3 L. R. Ch. App. 364.

In these cases it will be observed that persons making a promise to do something in itself not illegal, for a third party, are compelled to make good their promise by means of the Court holding them to be trustees to the extent of the promise.

Where, however, persons to whom property is devised upon a *secret trust or understanding* to compass what is illegal, as, for instance, to hold realty or property savouring of realty for the purposes of a charity in evasion of what is commonly called the Mortmain Act (9 Geo. 2, c. 36), there will be a resulting trust for the heir at law, or next of kin, according to the nature of the property, who may compel the devisee to disclose any promise he may have made to hold the realty or any part of it for the benefit of a charity. See *Stickland* v. *Aldridge*, 9 Ves. 516. There the heir at law filed a bill against a devisee, alleging that the devise was upon a secret trust or undertaking for a charitable purpose, against the statute 9 Geo. 2, c. 36. The bill prayed a discovery, and that the devise might be declared void, as within the Statute of Mortmain; that the defendant might deliver possession and an account. The defendant, as to so much of the bill as sought a discovery as to the supposed agreement, promise, undertaking, or acknowledgment, and as to the relief, pleaded in bar the Statute of Frauds (29 Car. 2, c. 3), and averred that he never did sign any writing, whereby he declared any trust or confidence concerning the lands devised. Lord *Eldon*, L. C., ordered that the plea should stand for an answer, with liberty to except. "It would be a strong proposition," said his Lordship, "that the providence of the legislature, having attempted expressly to pre-

vent a disposition of land for purposes of this sort, was so short as to be baffled by such a transaction as is stated by this Bill. The Statute was never permitted to be a cover for fraud upon the private rights of individuals; and, though within the intention it cannot be said a trust is declared under these circumstances, it is clear a trust would be created, upon the principle on which this Court acts, as to fraud. . . . . It would be singular if the Court would protect individuals, and would not act to prevent a fraud upon the law itself." See also *Muckleston* v. *Brown*, 6 Ves. 52; *Burney* v. *Macdonald*, 15 Sim. 6; *Russell* v. *Jackson*, 10 Hare, 204; *Lomax* v. *Ripley*, 3 Sm. & G. 48; *Carter* v. *Green*, 3 K. & J. 561; *Moss* v. *Cooper*, 1 J. & H. 352; *M'Cormick* v. *Grogan*, 4 L. R. Ho. Lo. 82; *Springett* v. *Jennings*, 10 L. R. Eq. 488, 6 L. R. Ch. App. 333.

In such cases, although the Statute of Mortmain (9 Geo. 2, c. 36), declares a devise "in trust or for the benefit of" a charity to be absolutely void, it has, after some conflict of judicial opinion (*Adlington* v. *Cann*, 3 Atk. 156; *Edwards* v. *Pike*, 1 Eden, 267; *Boxon* v. *Statham*, Ib. 508; *Bishop* v. *Talbot*, 6 Ves. 60, cited), been ultimately decided that the devise of the legal estate is valid, but that the Court of equity will, for the reasons before mentioned, fasten a trust thereon in favour of the heir. *Sweeting* v. *Sweeting*, 10 Jur. N. S. 31.

If there has been a devise to several persons as *joint tenants*, and one of them has either expressly promised to dispose of the property for a charitable purpose, or has by his silence or acquiescence given the testator to understand that he would do so, they will hold the property as trustees for the heir at law: *Russell* v. *Jackson*, 10 Hare, 204. See also *Carter* v. *Green*, 3 K. & J. 603; *Jones* v. *Badley*, 3 L. R. Ch. App. 362, reversing *S. C.* 3 L. R. Eq. 635. But a mere statement in a will of one of the joint-tenants, that the property was held in trust, will not affect the beneficial interest of the survivors, when nothing had taken place on the part of any of the joint-tenants during the life of the testator which would be sufficient to fasten upon them a trust. *Turner* v. *The Attorney General*, 10 Ir. R. Eq. 386.

Where, however, a devise was made to several persons, as *tenants in common*, and a subsequent communication of the testator's intentions in favour of a charity, was made to one of them only, the other devisees were held not to be affected by a trust. *Tee* v. *Ferris*, 2 K. & J. 357.

Where property is devised to persons with power to dispose to such charities as they may think proper, the heir, according to Lord *Eldon*, may have a right to call upon them to say whether they

have done so, or mean to do so, and how much they mean to dispose of: *Muckleston* v. *Brown*, 6 Ves. 66.

The onus, however, lies upon the plaintiffs of showing that a trust for a charity was communicated to, and expressly or tacitly accepted by the devisees; but if this is not admitted by the defendants, he may prove it by evidence aliunde: *Edwards* v. *Pike*, 1 Eden, 267.

Although a charitable desire or object may have existed in the mind of the testator making a devise, if the plaintiffs fail to show that any secret trust for charity was communicated to or accepted, or acquiesced in by the defendants, the devise will be valid, although the devisees intend to carry out the charitable intentions of the testator: *Wallgrave* v. *Tebbs*, 2 K. & J. 313; *Lomax* v. *Ripley*, 3 Sm. & G. 48; *Jones* v. *Badley*, 3 L. R. Ch. App. 362, reversing *S. C.* 3 L. R. Eq. 635; *Turner* v. *The Attorney General*, 10 Ir. R. Eq. 386.

Even where a devisor, after devising lands, declares a trust in favour of a charity by any unattested paper or by parol, if the plaintiff cannot prove that the devisee has either expressly or impliedly engaged to carry out the same, he will be able to claim the land unaffected by the trust. See *Adlington* v. *Cann*, 3 Atk. 141, where Lord *Hardwicke* was clearly of opinion, that there being nothing in the will attaching a trust, if the testator afterwards, by an unattested paper, expressing his own intention, not communicated, said, the purpose was to devote the estate to a charitable purpose, the devisee might object, that he had taken under a will well executed; and that the subsequent paper was not well executed: *Wallgrave* v. *Tebbs*, 2 K. & J. 313; *Lomax* v. *Ripley*, 3 Sm. & G. 48.

The result, however, would be otherwise, if the devisee induced the devisor to make the will, or to refrain from altering it when it was made, in his favour, upon the understanding that he would carry out the trusts contained in the unattested paper: *Russell* v. *Jackson*, 10 Hare, 204.

If a testator makes a devise, meaning at the time thereafter duly to declare the trusts, and it happened that he did not declare any, the case would lie, it seems, within the equity of the Court, and if the devisees admitted his will was made upon such an undertaking, that they would execute the trusts, the heir might have a right to say no trust was duly declared, that the purpose therefore failed, and the trusts resulted to him, not upon the intention, but upon the ground that there was no intention, and that he was entitled to avail himself of that: *Muckleston* v. *Brown*, 6 Ves. 52, 64. See also *Russell* v. *Jackson*, 10 Hare, 204.

CUDDEE *v.* RUTTER.

Trin. Term, 6 *Geo.* 1.

[REPORTED 5 VIN. AB. 538, PL. 21.]

S. C. nom. *Cud* v. *Rutter*, 1 P. Wms. 570; 2 Eq. Ca. Ab. 18, pl. 8; Prec. Ch. 534, cited, nom. *Scould* v *Butter*; Reg. Lib. A. 1719, fol. 35; Reg. Lib. B. 1719, fol. 411.

SPECIFIC PERFORMANCE OF AGREEMENTS RELATING TO PERSONAL PROPERTY.]—*A bill in equity will not lie for specific performance of an agreement to transfer South-sea Stock.*

BILL for a specific performance of an agreement to transfer stock.—The case was, the defendant agreed with the plaintiff to transfer to him 1000*l.* South-sea Stock, upon the 20th of November then next following, at the rate of £104 per cent., and gave him a promissory note under his hand for so doing, and received two guineas of the plaintiff in part of the consideration-money; but the defendant, in drawing the note, had put in the usual words "or pay the difference," which the plaintiff struck out, and would not agree to, and then the defendant signed the note.

After the bargain was made, and before the time of delivering the stock, the South-sea Stock rose considerably in value, and the defendant did not deliver the stock at the day, but a few days afterwards offered to pay the difference, and submits so to do by his answer; but the plaintiff insists to have the stock actually transferred to him, and refuses to take the difference, &c.

Sir *Robert Raymond* and *Mr. Vernon*, for the defendant, insisted, that buying of stock in this manner, to be delivered at a future time, at a certain price, was in the nature of a wager upon the rise and fall of stock, and therefore paying the difference is a sufficient performance of the contract; that a contract for the sale of stock differs from

other contracts for sale of a house, lands, &c., for in such things there may be a particular conveniency or benefit to the buyer in this individual house, &c.: but it is not so in stock, for one 1000*l.* is as good as another 1000*l.* stock, and is to be purchased daily in Exchange-alley: that the plaintiff has his remedy at law for the damages; viz. the difference, and that is the justice of the case between the parties: that it is discretionary in the Court to decree a specific performance of an agreement, and that in many cases the Court will leave the party to his remedy at law for breach of a contract, &c.

Sir Joseph Jekyll, M. R., said, that this is a fair and reasonable agreement, and he saw no reason why the Court should not in this case, as well as others, decree a specific performance of the contract, especially since it was insisted upon by the plaintiff, at the making the agreement, that he should not be obliged to take the difference, but would have the stock actually delivered to him; and it is more for the advantage of the buyer to have the stock than the difference, and saves him the trouble of buying it of another, and paying brokerage: and decreed that the defendant do transfer the stock, and pay the dividends since the 20th of November, plaintiff to pay interest of the money to that time, and ordered costs to the plaintiff.

Lord Chancellor Parker (*a*), on an appeal from this decree, upon opening the cause, asked if the plaintiff was at the South-sea House upon the day appointed for transferring the stock, to demand it, and tender the money, and seemed strongly against the plaintiff, and urged the law in case of a bargain for corn to be delivered upon a day certain at such a market, at such a price, and the corn is not delivered according to the contract; the buyer shall not by a bill in equity compel the seller to a specific performance of this agreement, but the buyer is left to his remedy at law, for breach of the agreement to recover damages, id est, the difference between the price agreed on by the parties, and the price of corn upon the market-day.

(*a*) Afterwards Earl of Macclesfield.

Argument for the plaintiff.

It was said, it was the common justice of this Court to compel the party to a specific performance of his agreement, if the same was just and reasonable, and fairly obtained: that this was a just, reasonable, and fair agreement in all the circumstances: it was the current price of the stock at that time, and no imposition upon the defendant: that the subsequent rise could not alter the case, for it was an equal hazard that it might fall, and the parties in such contracts executory must take their chance. They compared it to the case of a contract for so many bales of silk, or any other merchandise, to be delivered at a future day, at a certain price: if the value of the silk, or other goods, doth rise before the day, that is no excuse for non-performance of the contract. So, in the case of a contract for lands, if lands rise in value, yet the party ought to execute his agreement. They said, that, from the time of the contract to the time appointed for the delivery, the stock did not rise above 12*l.* per cent.; that it was not more at the time of filing the bill, which was in January, 1718; nay, it was not more at the time of the decree pronounced by the Master of the Rolls in Michaelmas Term last: and though the stock has risen since to a vast price, between 900*l.* and 1000*l.* per cent., if the defendant suffers by that it is his own fault in not performing his contract sooner, when he was demanded so to do, and in not obeying the decree, as he ought to have done: that whatever has happened since cannot alter the case: that the contract was reasonable at the time it was made, and so it was when the bill was filed and the decree pronounced.

Argument for the defendant.

It was said for the defendant, that the rule was laid down too general for compelling the execution of agreements between the parties: that this Court would not compel the party to perform a hard agreement, though it was fair at the time it was made, but leave the other party to his remedy at law: that it was very unreasonable now to compel the defendant to transfer 1000*l.* South-sea Stock to the plaintiff, at 104*l.* 10*s.* per cent., when it was worth 1000*l.* per cent.; that paying the difference

at the day was a good performance of this contract: that the plaintiff knew that the defendant had no stock when he made the bargain with him, and therefore could not expect to have the stock delivered to him, but to have the difference if the stock should happen to rise before the time; and he had no more intention to take the stock than the other had to deliver it, and this appears by his non-attendance at the South-sea House upon the day to accept and pay for the stock. They cited the case of *The Marquess of Normanby* v. *Lord Berkly*, temp. Lord *Somers*, C., who said, in that case, that the Court would not carry agreements into execution unless the contract was reasonable and fair in every particular, because they cannot mitigate damages upon the circumstances of the case, as a jury may do, but must decree the whole contract to be performed.

Reply for the plaintiff.

It was replied that the plaintiff, some days before the stock was to be delivered, told the defendant that he expected to have the stock delivered to him; but the defendant said that he had not the stock, and therefore could not deliver it; and afterwards the defendant kept out of the way for some days, and the plaintiff could not find him, and that was the reason he did not attend at the South-sea House to accept the stock; that, this being occasioned by the defendant's own unfair dealing, the plaintiff ought not to suffer by it; and upon that account the plaintiff ought to be relieved in equity, because he is remediless at law for want of a legal demand and tender upon the day.

Lord Chancellor Parker.—There is no reason to bring this bill for a specific performance of this agreement, because there is no difference between this 1000*l.* South-sea Stock and another 1000*l.* stock, which the plaintiff might have bought of any other person upon the very day; and the plaintiff does not suffer at all by the non-performance of the agreement specifically, if the defendant pays him the difference.

These sorts of contracts are commonly understood to

mean no more than to transfer the stock or pay the difference, and this fully answers the intention of the parties; and the party has thereby the entire benefit of his contract as fully as if the stock were actually delivered, for he may buy of any other person, and be no more money out of pocket than if the stock were delivered to him according to the agreement. This differs very much from the case of a contract for lands, some lands being more valuable than others—at least, more convenient than others—to the purchaser; but there is no difference in stock—one man's stock is of equal benefit and convenieney as another's.

Secondly, it appears that the defendant had not the stock when the contract was made, and this Court will not decree a specific performance of a contract when the party has not the thing to deliver. Suppose a contract for the sale of land, and the party has not the land at the time he contracted for the sale of it, this Court would not decree a specific performance of the agreement. If there be a contract for the sale of malt, or any other commodity, and the seller has not the malt or other things agreed to be delivered, this Court would not compel the party to perform his agreement, but leave the buyer to recover his damages at law for non-performance of the agreement.

Thirdly, in contracts for stock, being subject to sudden rise and fall, the day is the most material part of the contract, and therefore not proper for a court of equity to carry into execution. The decree might be beneficial to the plaintiff one day, and to his prejudice the next. I shall always discourage bills of this kind; but since the defendant did shuffle with the plaintiff, and not offer to pay him the difference till two months after the day, I will not dismiss the bill, but let the Master inquire what the difference was at the day, and the defendant pay it to the plaintiff, with interest, but no costs.

It is proposed in this note to consider the question much discussed in the principal case, viz., of what contracts courts of equity will decree the specific performance. This may be considered most conveniently under three general heads:—1st. When the contract relates to property, whether real or personal; 2nd. When the contract relates to personal acts; and 3rd. The extension of the jurisdiction of equity in matters of specific performance by the legislature conferring powers to award damages in certain cases.

It must, however, be first observed, that a court of equity will not decree specific performance of a contract unless it be founded upon valuable consideration: *Cochrane* v. *Willis*, 34 Beav. 359.

1*st. As to contracts relating to real and personal property.*]—Where a contract in writing respecting real property, in conformity with the Statute of Frauds, is entered into between competent parties, and is, moreover, in its nature and circumstances, unobjectionable, it is as much of course for a court of equity to decree a specific performance, as it is for a court of common law to give damages for the breach of such a contract: *Hall* v. *Warren*, 9 Ves. 608. The original and sole foundation of the jurisdiction to decree the specific performance of contracts is simply this—that an award of damages at law will not give a party the compensation to which he is entitled; that is, will not put him in a situation as beneficial to him as if the agreement were specifically performed: *Harnett* v. *Yeilding*, 2 S. & L. 553.

As to the jurisdiction to enforce the specific performance of contracts relating to lands out of the jurisdiction of the Court, see *Penn* v. *Lord Baltimore*, vol. ii. post.

The decision in the principal case shows that specific performance of agreements relating to personalty will not, as in the case of agreements relating to realty, be invariably decreed: it will, however, be seen, upon examining the authorities, that whenever courts of equity refuse to interfere with agreements relating to personalty, they do so, not because of any difference between real and personal property, but because damages at law will be an adequate compensation; and there is, therefore, no reason why the jurisdiction of equity should be called into action. Upon this ground chiefly the Lord Chancellor, in the principal case, refused to decree the specific performance of the agreement, observing, that it differed much from "a contract for lands, some lands being more valuable than others—at least, more convenient than others—to the purchaser; but there is no difference in stock—one man's stock is of equal benefit and conveniency as another's." So, likewise, in *Adderley* v. *Dixon*, 1 S. & S. 610, Sir

John Leach, V. C., observes—"Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus, a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So, a court of equity will not, generally, decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as with the damages he may purchase the same quantity of the like stock or goods." In *Buxton* v. *Lister*, 3 Atk. 384, Lord *Hardwicke*, C., lays down the same distinction between contracts relating to chattels and contracts relating to lands; but he does not give the same reasons for the distinction. "In general," he says, "this Court will not entertain a bill for a specific performance of contracts of stock, corn, hops, &c.; for, as those are contracts which relate to merchandise, that vary according to the different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract, to the ruin of one side, when upon an action that party might not have paid, perhaps, above a shilling damage. . . . . As to the cases of contracts for the purchase of lands or things that relate to realties, those are of a permanent nature; and, if a person agrees to purchase them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade." The reasons, however, given by Lord *Hardwicke* for a court of equity not entertaining jurisdiction in cases of chattels, as is well observed by Chief Baron *Richards*, would equally apply to contracts for the purchase of land, which falls and rises in value in an extraordinary manner. See *Wright* v. *Bell*, 5 Price, 329. The reasons given by Sir *John Leach* are the best.

The question, therefore, in all cases where the specific performance of an agreement relative to personalty was sought, was this—would damages at law afford an adequate compensation for breach of the agreement? If it would, there was no occasion for the interference of equity; the remedy at law was complete: if it would not, specific performance of the agreement, as in the case of an agreement relating to realty, would be enforced.

In *Cappur* v. *Harris*, Bunb. 135,

Mr. Baron *Gilbert* laid down, as a general rule, that a court of equity will not aid a person coming to have a contract for South-sea Stock carried into execution, but will leave him to such remedy as he could have at law. See, also, *Nutbrown* v. *Thornton*, 10 Ves. 161, where Lord *Eldon* observes, "It is now perfectly settled that this Court will not enforce the specific performance of an agreement for a transfer of stock; but in a book I have of Mr. Brown's I see Lord *Hardwicke* did that." So, in *Buxton* v. *Lister*, 3 Atk. 384, Lord *Hardwicke* says, "In general, this Court will not entertain a bill for a specific performance of contracts of stock, corn, hops, &c."

In the recent case of *Fothergill* v. *Rowland*, 17 L. R. Eq. 132, where the lessee of a colliery contracted to raise and deliver to the plaintiffs all the get of coals at a fixed price for five years, and subsequently contracted to sell the colliery to other parties, it was held by Sir *G. Jessel*, M.R., that inasmuch as the court could not compel specific performance of the contract, it could not by injunction restrain the breach thereof. "I think," said his Honor, "it must be assumed to be a simple contract for the sale of a chattel of a very ordinary description not alleged to be a peculiar coal, or coal that cannot be got elsewhere. On the contrary, as I read the bill, there is coal that can be got elsewhere of the same description, only at a higher price. The result is that the plaintiffs will incur an amount of damage to be measured by the market price which they may have to pay for the coal of the same description as the coal agreed to be supplied by the defendant Rowland. . . . . Then it is said, assuming this contract to be one which the Court cannot specifically perform, it is yet a case in which the Court will restrain the defendants from breaking the contract. . . . . I am not entirely without assistance from authority, because it appears to me that this very case has been put, though only by way of illustration by a very great Judge, Lord *Cottenham*, in *Heathcote* v. *North Staffordshire Railway Company*, (2 Mac. & G. 112), where he says: 'If A. contract with B. to deliver goods at a certain time and place, will equity interfere to prevent A. from doing anything which may or can prevent him from so delivering the goods?' That is the exact case I have to deal with, because I have decided that the contract is a contract for the delivery of goods. Finding the dictum of Lord *Cottenham* express on the subject, and the plaintiff's counsel not having been able to produce to me any authority in which there has been such an injunction granted on the sale of goods, or any chattel, in a case in which specific performance could not be granted, I think I

shall do right in following that authority; and I say, although I say it with much regret, that it is a case in which equity can afford no relief."

In the following cases, however, it has been held, that, as damages at law could not be correctly estimated, or would not furnish a complete and adequate remedy for the non-performance of a contract relative to personal property, equity ought to decree specific performance. In *Taylor* v. *Neville*, cited in *Buxton* v. *Lister*, 3 Atk. 384, specific performance was decreed of a contract for sale of 800 tons of iron, to be delivered and paid for in a certain number of years, and by instalments; and the reason given by Lord *Hardwicke* is, "that such sort of contracts differ from those that are immediately to be executed;" and they do differ in this respect, that the profit upon the contract, being to depend upon future events, cannot be correctly estimated in damages, where the calculation must proceed upon conjecture. In such a case, to compel a party to accept damages for the non-performance of his contract, is to compel him to sell the actual profit which may arise from it at a conjectural price. In *Ball* v. *Coggs*, 1 Bro. P. C. 140, Toml. ed., specific performance was decreed, in the House of Lords, of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundredweight of brass wire manufactured by him during his life as manager of certain mills belonging to the defendants; for damages might be no complete remedy, being to be calculated merely by conjecture: and to compel the plaintiff, in such a case, to take damages, would be to compel him to sell the annual provision during his life, for which he had contracted, at a conjectural price. In *Buxton* v. *Lister*, 3 Atk. 385, Lord *Hardwicke* puts the case of a ship-carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity, and also the case of an owner of land covered with timber contracting to sell his timber in order to clear his land; and assumes that, as in both those cases damages would not, by reason of the special circumstances, be a complete remedy, equity would decree specific performance—Per Sir *J. Leach*, V.C., 1 S. & S. 610. In *Thorn* v. *The Commissioners of Public Works*, 32 Beav. 490, Lord *Romilly*, M. R., decreed specific performance of a contract to purchase the arch stone, spandrill stone, and the Bramley Fall stone contained in the old Westminster Bridge. See also *Pollard* v. *Clayton*, 1 K. & J. 462; and the comments therein of Sir *W. Page Wood*, V. C., on *Taylor* v. *Neville*, and *Buxton* v. *Lister*, Ib. p. 474.

So a contract for the purchase of articles of unusual beauty, rarity, and distinction, such as

objects of virtu, will be enforced, as damages would not be an adequate compensation for non-performance—per *Kindersley*, V. C., in *Falcke* v. *Gray*, 4 Drew. 658.

Upon the ground that the remedy ought to be mutual, a court of equity will, upon a bill filed by a vendor, enforce specific performance of a contract to purchase debts, although he seeks only for payment of the purchase-money. Thus in *Adderley* v. *Dixon*, 1 S. & S. 607, the plaintiffs, having purchased and taken assignments of certain debts which had been proved under two commissions of bankruptcy, agreed to sell them to the defendant for 2*s*. 6*d*. in the pound. Sir *John Leach*, V. C., compelled a specific performance of the agreement at the suit of the vendor. "The present case," observed his Honor, "being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me, that, upon the principle established by the cases of *Ball* v. *Coggs*, and *Taylor* v. *Neville*, a court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take such damages would be to compel him to sell those dividends at a conjectural price. It is true, that the present bill is not filed by the purchaser, but by the vendor, who seeks, not the uncertain dividends, but the certain sum to be paid for them. It has, however, been settled by repeated decisions, that the remedy in equity must be mutual, and that where a bill will lie for the purchaser, it will also lie for the vendor." So, in *Wright* v. *Bell*, 5 Price, 325, Dan. Ex. Rep. 95, a specific performance of a contract to purchase a debt was enforced.

In *Withy* v. *Cottle*, 1 S. & S. 174, a demurrer to a bill filed by the vendor for the specific performance of an agreement for the purchase of an annuity payable out of the dividends of stock standing in the name of the Accountant-General of the Court of Chancery, was overruled by Sir *John Leach*, V.-C. "There can be no doubt," observed his Honor, "that the defendant, who is the purchaser of this annuity, might have filed a bill for the specific performance of the agreement for sale to him, because a court of law could not give him the subject of his contract, and the remedy here must be mutual for purchaser and vendor:" and see *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138, 9 Jur. 633.

And a court of equity will, on behalf of a vendor of life annuities, enforce specific performance of the contract, by compelling payment of the purchase-money, even after the death of the annuitant: at any rate, where there are arrears of the annuity due, sufficient to support a bill filed by the annuitant. It

is true that a court of equity entertains a suit for specific performance by a *purchaser* in order to give him the very subject of his contract; nevertheless, although the demand of the vendor be merely for a sum of money, it will entertain a similar suit for him, upon the principle that the remedies ought to be mutual. *Kenney* v. *Wexham*, 6 Madd. 355, 357.

And where there is a valid contract for the sale of a patent, the Court will specifically enforce it, in a suit by a purchaser against the vendor, and will make the latter execute an assignment. The opposite also is equally true, that the vendor may come into equity for the purchase-money: *Cogent* v. *Gibson*, 33 Beav. 557.

In contracts relating to commodities fluctuating from day to day in market price, the Court expects persons to be unusually vigilant and active in asserting their right to specific performance, which it is inequitable to grant after a delay on the part of the plaintiff, and when the parties may be no longer in the same position. *Pollard* v. *Clayton*, 1 K. & J. 462.

And a court of equity will not only entertain suits for specific performances of contracts by vendors in ordinary cases where the price is named, but also where land has been taken by a railway company, and the price ascertained by a jury. See *Doherty* v. *Waterford and Limerick Railway Company*, 13 Ir. Eq. Rep. 538. "A legal remedy," said Lord Chancellor *Brady*, exists to recover the money; but it is a fallacy to say that, because the plaintiff insists upon the specific performance of the contract—and that is the decree the Court is called on to make—the parties should go to law. There must exist mutuality; the company could file a bill to compel the transfer, and the plaintiff accordingly has the right to insist upon this specific performance of the contract."

And where a railway company has given notice to treat for land to the landowner, and the price of the land has been fixed by the landowner and the company (*Ex parte Hawkins*, 13 Sim. 569) or by arbitrators under the Lands Clauses Consolidation Act, the railway company is in the same position with regard to the landowner as an ordinary purchaser, and will be compelled by a court of equity to complete the purchase (*Harrey* v. *Metropolitan Railway Company*, 7 L. R. Ch. App. 154. Where a railway company, after having given notice to treat, has paid the purchase-money for leaseholds, and has, with the consent of the lessee, been admitted into possession, it will at the suit of the lessee within a reasonable time, be compelled to accept an assignment containing the usual covenants. *Ib.* See also *Harding* v. *The Metropolitan Railway Company*, 20 W. R. (L. C.) 321.

Interest at 4 per cent. is payable by a railway company upon the purchase or compensation money from the time of their taking possession of the land under their statutory powers, and not merely from the subsequent period of ascertaining the price by the verdict of a jury. The reason for this rule is, that from the time when the railway company exercised their statutory rights and took possession of the land which belonged to the plaintiffs, they became the owners of the land, and from that day the plaintiffs became the owners of the price payable for the land. *Rhys* v. *Dare Valley Railway Company*, 19 L. R. Eq. 93, 95.

When a railway company has given notice to a landowner to treat for a portion of a piece of land, and the latter has given notice to the company to take the whole, if on a bill filed by the landowner for a declaration made in accordance with his notice, such declaration is made reserving further consideration, and upon inquiry the title is found to be good, the Court has made an order compelling the company to take the necessary steps for ascertaining the value of the whole of the land, for payment of the value so ascertained, and for the execution of a conveyance to the company (*Marson* v. *The London, Chatham, and Dover Railway Company*, 7 L. R. Eq. 546, 6 L. R. Eq. 101); but if the railway company, after a bill has been filed by the landowner for a declaration that they should not take a part without taking the whole of his land, give notice of their intention to withdraw from the notice to treat, even although they may, previous to the filing of the bill, have given notice of their intention to apply for the appointment of a surveyor to ascertain the value of the whole of the land, the Court will not decree specific performance, inasmuch as a mere notice of intention to apply for the appointment of a surveyor did not amount to a binding contract by them to take the property, and that they were therefore at liberty to withdraw their notice to treat. *Grierson* v. *Cheshire Lines Committee*, 19 L. R. Eq. 83.

Although courts of equity, as we have seen, will not ordinarily decree specific performance of contracts to purchase chattels, if damages at law will be an adequate compensation; nevertheless, if a trust be created, the circumstance that the subject matter to which the trust is attached is a personal chattel, will not prevent the Court from enforcing the due execution of that trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of the trust. *Pooley* v. *Budd*, 14 Beav. 34, 43, 44, per Sir *J. Romilly*, M. R. "For instance, if a man about to contract marriage,

and possessed of a large and valuable quantity of iron, lead, or copper ore, assigned that ore to the trustees of the settlement, in trust to sell and invest the proceeds, and hold the proceeds when invested, upon the trusts of the settlement, there can be no question but that this Court would, before the sale, compel the possessor of the ore and the trustees of the settlement to fulfil every part of the trust which one had undertaken to constitute, and the other had undertaken to execute." *Ib.* p. 43.

So where a person had by agreement declared himself to be the trustee of stock for another person, with whose money it had been purchased, it was held, that the doctrine acted upon in the principal case was not applicable, and a transfer was compelled to the person beneficially entitled. *Stanton* v. *Percival*, 5 H. L. Cas. 257, 268.

In the case of *Dolorct* v. *Rothschild*, 1 S. & S. 590, it was held by Sir *John Leach*, V. C., that a bill would lie for the specific performance of a contract for the purchase of Neapolitan stock, where it prayed for the delivery of the certificates which would constitute the plaintiff proprietor of a certain quantity of stock; "because," said his Honor, "a court of law could not give the property, but could only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party. I consider, also, that the plaintiff, not being the original holder of the scrip, but merely the bearer, may not be able to maintain any action at law upon the contract, and that if he has any title, it must be in equity."

In *Duncuft* v. *Albrecht*, 12 Sim. 189, specific performance of a parol agreement for the sale of some railway shares was decreed by Sir *L. Shadwell*, V. C. "The only question," observed his Honor, "is, whether there has been any decision from whence you can extract a conclusion that the Court will not decree a specific performance of an agreement for the sale of such shares. Now, I agree that it has been long since decided, that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there is not any sort of analogy between a quantity of 3*l.* per Cents, or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market." This decision was, on the 23rd of July, 1841, affirmed by the Lord Chancellor. And see *Shaw* v. *Fisher*, 2 De G. & Sm. 11; *Wilson* v. *Keating*, 7 W. R. (M. R.) 484.

And specific performance has been decreed of a contract for the sale of shares in a joint stock company, although there was a provision in the deed of settlement "that no shareholder should be at liberty to transfer his shares except in such manner as a board of directors should approve." See *Poole* v. *Middleton*, 29 Beav. 646, where the Master of the Rolls said that he did not say whether the plaintiff would become a shareholder unless the board of directors approved of the manner in which the transfer was made. That the mode of transfer must be approved by the board, who could not exercise an arbitrary and unreasonable will on such an occasion, or reject the mode of the transfer, in that instance, which they approved and allowed in other cases.

But the Court will not ordinarily compel specific performance of a contract to sell shares, where the assent of the directors is necessary in order that the purchaser's name be placed upon the register, and they refuse to give it (*Bermingham* v. *Sheridan*, 33 Beav. 660; *Re Gresham Life Assurance Society*, 8 L. R. Ch. App. 446), but if the directors wantonly or for some idle and foolish reason refused to admit a purchaser, the Court might compel them to do so, and compel specific performance of the contract: 33 Beav. 665, and see *Robinson* v. *The Chartered Bank*, 1 L. R. Eq. 32. Again a contract of this nature might exist:—A purchaser might say to a vendor, "I will buy your 1000 shares in this company; if the directors do not chose to assent to my being put on the list of shareholders, we cannot compel them to do so; nevertheless, as between ourselves, there shall be this contract:—we will act exactly as if the shares had been sold to me, and I had been accepted as a shareholder. You shall pay me all the future dividends, and I will pay every future call, and indemnify you from every liability:" per Sir *John Romilly*, M. R., 33 Beav. 665.

An agreement to accept a transfer of railway shares on which nothing has been paid, may be enforced as an agreement for valuable consideration, in consequence of the liabilities to which the purchaser is subjected, and from which the vendor is relieved upon the transfer: *Cheale* v. *Kenward*, 3 De G. & Jo. 27.

And where specific performance has been decreed of a contract to purchase railway shares, the Court will order the purchaser to pay the calls that have been made since the sale, to indemnify the vendor against all future calls in respect of the shares, and to take proper measures to procure himself to be registered: *Wynne* v. *Price*, 3 De G. & Sm. 310; *Shaw* v. *Fisher*, 5 De G. M. & G. 596.

Where, however, a person previous to the passing of the Act of

Parliament authorising a proposed railway, purchased some "scrip certificates," and upon payment of the purchase-money received and returned the certificates, though no particular contract was entered into upon the occasion, it was held by Lord *Langdale*, M. R., that after the Act had passed, the purchaser was not bound to take a transfer of the corresponding shares from the vendor, or to indemnify him from the amount of calls subsequently made. "This," said his Lordship, "is called a purchase of shares, when it is a purchase of mere certificates, and the question is, whether there is a contract on the part of the defendant to become a proprietor at all events? I cannot find it expressed, and I cannot raise it by implication of law. There is not, in my opinion, any evidence of such an agreement as the plaintiff seeks to have specifically performed: and the bill must therefore be dismissed with costs." *Jackson* v. *Cocker*, 4 Beav. 66.

An agreement to accept shares in a joint stock company by a defendant who fills up and signs a form to that effect, will be specifically performed against him in equity (*The New Brunswick and Canada Railway and Land Company* (*Limited*) v. *Muggeridge*, 4 Drew. 686); but to entitle the directors to relief, their proceedings must be prompt (*The Oriental Inland Steam Company* (*Limited*) v. *Briggs*, 2 J. & H. 625); and it seems that specific performance will not be decreed to take shares where the partnership might be immediately put an end to: *The Sheffield Gas Consumers' Company* (*Registered*) v. *Harrison*, 17 Beav. 294, but see the observations on this case in *The New Brunswick and Canada Railway and Land Company* (*Limited*) v. *Muggeridge*, 4 Drew. 686.

It is no objection to specific performance, that a call may have been made by the company upon shareholders, of which call the purchaser had no notice, at any rate where there was no deception practised by the vendor: *Hawkins* v. *Maltby*, 3 L. R. Ch. App. 188, 4 L. R. Ch. App. 202.

Where, however, a person has agreed to purchase shares, or even if he has paid the purchase-money and executed the transfer, if he did so in ignorance that a petition for winding up the company had been presented, a court of equity would not decree specific performance of the contract, or render him liable as a contributory by directing his name to be put upon the register: *Emmerson's Case*, 1 L. R. Ch. App. 433.

So, where it is impossible that a purchaser's name can be put upon the register, the contract cannot be carried into execution, because part of the contract is, that the name of the purchaser should be put upon the register, and that part cannot be performed. See

Bermingham v. *Sheridan*, 33 Beav. 660.

The discretion of directors to forfeit shares for non-payment of calls is a trust to be exercised for the benefit of all the shareholders; an agreement, therefore, on the part of directors with a shareholder to relieve him from further liability on his consenting to an absolute forfeiture, will not be enforced if it appears not to have been a proper exercise of the discretion on the part of the directors : *Harris* v. *The North Devon Railway Company*, 20 Beav. 384.

It may be here mentioned, that all contracts after the 1st of July, 1867, for the sale of shares and stock in joint stock banking companies are void, unless the numbers by which such shares are distinguished are set forth in such contracts. 30 & 31 Vict. c. 29, s. 1. An error in the distinguishing numbers of shares in a transfer is immaterial, as it may be afterwards rectified. *In re International Contract Company, Ind's Case*, 7 L. R. Ch. App. 485.

Much discussion has of late taken place with reference to the liability of stock-jobbers, or buyers from them, towards the vendors of shares.

It is now, however, finally settled, after some conflict of decisions, that the contract of a jobber who purchases shares is, that at the settling-day he will either take the shares himself, in which case he would be bound to accept and register a transfer and to indemnify the vendor, or that he will give him the names of one or more transferees — names to which no reasonable objection can be made,—who will accept and pay for the shares : *Coles* v. *Bristowe*, 4 L. R. Ch. App. 11, per Lord *Cairns*, L. C.

Not only will the jobber be liable where he has not furnished the names of proper transferees who accept the shares, but also where other terms are added to the original contract, which he does not fulfil, by a complete novation, or a substitution of another contract for the original contract, his liability as principal will remain. See *Cruse* v. *Paine*, 4 L. R. Ch. App. 441. There the plaintiff, through his brokers, agreed to sell to the defendants, who were stock-jobbers, 100 shares in a company. The sale note was in the usual form, with the addition of the words "with registration guaranteed." The defendants before the day sent to the plaintiff's brokers the name of a transferee who duly paid the purchase-money. The seller executed the deed of transfer, and delivered it to the transferee. The transferee never registered the transfer, and calls were made upon the seller. Upon a bill being filed against the stock-jobbers, for specific performance and indemnity, it was held by the Lord Chancellor (Lord *Hatherley*), affirming the decision of Sir *G. M. Giffard*, V. C. (6 L.

R. Eq. 641), that the plaintiff was entitled to a decree, inasmuch as there was no novation or substitution of another contract for the original contract. See also *Maxted* v. *Paine*, 4 L. R. Ex. 203; *Grissell* v. *Bristowe*, 4 L. R. C. P. 36; reversing *S. C.*, 3 L. R. C. P. 112; *Davis* v. *Haycock*, 4 L. R. Ex. 373.

Where, however, the jobber, instead of taking the shares himself, elects to perform the other alternative, and sends in names which are accepted, and to which transfers are taken and paid for by the transferees or their brokers; the jobber is then and at that stage relieved from further liability, and the liability to register and indemnify is shifted to the transferees. See *Coles* v. *Bristowe*, 4 L. R. Ch. App. 3; there the plaintiff, a holder of 200 shares in a company, by his brokers contracted on the Stock Exchange for the sale of that number of shares to the defendants, who were jobbers, for a future day called settling-day. Before the settling-day, the jobbers on the day called the name-day, in accordance with custom of the Stock Exchange, gave to the vendor's broker the names of seventeen persons as ultimate purchasers, to whom the shares were to be transferred in different parcels. The brokers of the vendor accordingly prepared seventeen deeds of transfer, got them executed by the vendor, and on settling-day handed them and the share certificates to the jobbers, who thereupon paid the price agreed upon. In the meantime, the company had stopped payment, and was ordered to be wound up. The seventeen transferees, through their brokers, had paid their purchase-money to the jobbers, and had received but not executed the deeds of transfer, and the plaintiff, whose name remained on the list of shareholders, was obliged to pay calls on these shares. The plaintiff thereupon filed a bill against the jobbers, claiming indemnity against the calls. It was held by the Court of Appeal in Chancery reversing the decision of Sir *R. Malins*, V. C. (reported 6 L. R. Eq. 149), that the contract between the plaintiff and the jobbers must be interpreted according to the rules of the Stock Exchange, and that after the jobbers had paid to the vendor his purchase-money, and given the names of transferees to whom the vendor executed transfers, and after these transferees through their brokers had received the transfers and paid their purchase-money to the brokers, the liability of the jobbers had ceased, and that the bill ought to be dismissed. See also *Bowring* v. *Shepherd*, 6 L. R. Q. B. 309.

When the name of an infant is given by the jobber as a purchaser, the jobber, even although he is ignorant of the fact of the infancy, and a transfer has been executed to the infant, will be compelled

to indemnify the vendor. *Nickalls* v. *Merry*, 7 L. R. Ho. Lo. 530, affirming the decision of the Lords Justices who reversed the decision of Sir *J. Bacon*, V. C., nom. *Merry* v. *Nickalls*, reported 20 W. R. 531, 26 L. T. Rep. (N. S.) 496, and overruled the decision of Lord *Romilly*, M. R., in *Rennie* v. *Morris*, 13 L. R. Eq. 203. See also *Heritage* v. *Paine*, 2 Ch. D. 594. But the actual purchaser, who forwards the name of an infant to the jobber, will be compelled to indemnify the jobber: *Peppercorne* v. *Clench*, 26 L. T. Rep. (N. S.) 656. See also *Brown* v. *Black*, 8 L. R. Ch. App. 939, varying *S. C.* 15 L. R. Eq. 363.

The result will be the same where the name given is that of a non-existent person, a lunatic, a married woman, or a person who has given no authority for the use of his name. *Nickalls* v. *Merry*, 7 Ho. Lo. 530, 541.

Where after a contract by a vendor of shares on the Stock Exchange with a jobber, or intermediate person, a transfer has been executed by the vendor, and accepted and paid for by a third person, the vendor may file a bill against such third person, and oblige him to register and indemnify him from calls. Thus, in *Paine* v. *Hutchinson*, 3 L. R. Ch. App. 388, the plaintiffs, who were stock-jobbers, in November, 1865, bought shares in a company from one Cruse, which they shortly afterwards sold to Price and Potts, brokers, who on the settling day, gave the name of the defendant as transferee. The plaintiffs, thereupon, on the 17th of November, delivered to Price and Potts transfers of the shares from Cruse to the defendant only executed by Cruse. The defendant paid the purchase-money, but did not get the shares registered, and refused to do so, alleging that he had bought the shares on another person's account, and never intended to have them registered in his own name, nor authorised giving his name as a transferee, and that the shares had been sold without any special guarantee that the transfers should be executed by the purchaser—the defendant. In January, 1866, the plaintiffs filed their bill. On the 23rd April, 1866, an order was made for winding up the company. It was held by the Court of Appeal in Chancery, affirming with slight variations the decree of Sir *J. Stuart*, V. C. (reported 3 L. R. Eq. 257), that the plaintiffs were entitled to a decree for specific performance, and that the defendant ought to concur in the necessary steps for duly registering the shares in his name, and also to indemnify the plaintiffs: *Hodgkinson* v. *Kelly*, 6 L. R. Eq. 496; *Hawkins* v. *Maltby*, 6 L. R. Eq. 505; 4 L. R. Ch. App. 200; *Sheppard* v. *Murphy*, 1 I. R. Eq. 490; 2 I. R. Eq. 544.

Specific performance and in-

demnity will be decreed against the purchaser, although by accident, he only sent the transfers for registration after the company had stopped payment: *Evans* v. *Wood*, 5 L. R. Eq. 9. And in the absence of evidence that the transferee was objectionable, it would be presumed that directors, though having a discretionary power to refuse, would have registered the transfer (*Ib.*), for the directors could not have refused arbitrarily or wantonly to register: *Poole* v. *Middleton*, 29 Beav. 646.

And where the actual purchaser of shares, or his broker, gives the name of a third party, as purchaser to whom the transfers are made out, if such third party by his conduct induces the vendor to believe that he has adopted the contract, he will be compelled specifically to perform it. See *Shepherd* v. *Gillespie*, 5 L. R. Eq. 293; there a broker, on the instructions of Wilkinson, purchased from the plaintiff shares in a Company subsequently wound up, and on the settling day the broker, also on the instructions of Wilkinson, gave the name of Gillespie as the purchaser, and the deeds of transfer were made out in Gillespie's name and delivered to him for execution, and he for some time, retained possession of and dealt with them. Wilkinson informed Gillespie, that he had passed his name as transferee, and had also passed a cheque on the company's bankers for the purchase-money to the debit of his firm. Gillespie took no step to inform the vendor that he did not assent to the contract, though he did express his dissent to Wilkinson. It was held by Sir *John Stuart*, V. C., that the vendor was entitled to specific performance of the contract against Gillespie, and to have the shares registered in Gillespie's name, and to be repaid by Gillespie all calls which he had already paid, and to be indemnified against future calls, and against all liability, loss, costs, damages, and expenses, which he had incurred or might thereafter incur, by reason of being settled on the list of contributors, in respect of such shares. See Form of Decree, 5 L. R. Eq. 298, 299, 300.

It has been decided that a Court of equity will neither decree specific performance of a contract to lend (*Sichel* v. *Mosenthal*, 30 Beav. 371; *Brough* v. *Oddy*, 1 Russ. & My. 55; *Flight* v. *Bolland*, 4 Russ. 298, 301; *Thorpe* v. *Hosford*, 20 W. R. (V. C. B.) 922; but see *Bass* v. *Clivcley*, Taml. 80), nor of a contract to borrow (*Rogers* v. *Challis*, 27 Beav. 175) or to pay (*Crampton* v. *The Varna Railway Company*, 7 L. R. Ch. App. 562) money; but the Court will always decree specific performance of an agreement to execute a mortgage in consideration of money due (*Ashton* v. *Corrigan*, 13 L. R. Eq. 76; *Hermann* v. *Hodges*, 16 L. R. Eq.

18); or an agreement by parol to execute a bill of sale of personal chattels to secure the plaintiff against certain liabilities, *Taylor* v. *Eckersley*, 2 Ch. D. 302.

The specific performance of contracts for the purchase of chattels, may, clearly, be resisted upon the same grounds as the specific performance of other contracts. Thus, in a recent care, where the plaintiff had, without actual fraud, contracted for the purchase of two very valuable jars, the parties not being upon an equal footing, since the plaintiff well knew, and the vendor (who was an elderly lady) was ignorant of their value, and sold them at an inadequate price, Sir *R. T. Kindersley*, V. C., dismissed the bill seeking specific performance of the contract: *Falcke* v. *Gray*, 4 Drew. 651.

In the principal case, the Lord Chancellor lays it down as a general rule, "That the Court will not decree a specific performance of a contract when the party has not the thing to deliver." This was acted upon in a modern case, a bill having been filed against the provisional committee of a projected railway company for specific performance of an agreement to deliver to the plaintiff a certain number of scrip certificates; as there was no allegation in the bill that the defendants had in their possession any scrip to deliver, but statements from which the contrary might rather be inferred, Lord *Cottenham*, C., allowed a demurrer to the bill. *Columbine* v. *Chichester*, 2 Ph. 27. See *Pollard* v. *Clayton*, 1 K. & J. 475.

There is an exception to the ordinary rule of specific performance, when British ships, or shares in them, form the subject matter of the contract; for it is clear that a Court of equity will not enforce a contract for the purchase, either of a British ship, or shares in a British ship; inasmuch as, according to the policy of this country, both under the old Ship Registry Acts (*Brewster* v. *Clarke*, 2 Mer. 75; *Thompson* v. *Leake*, 1 Madd. 39; *Newnham* v. *Graves*, ib. 399, n.; *Battersby* v. *Smith*, 3 Madd. 110), and under the Act lately in force (8 & 9 Vict. c. 89, ss. 34, 37, *Hughes* v. *Morris*, 2 De G. M. & G. 349, 357), there could be no transfer of a ship in equity that is not a transfer at law.

The law is the same under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), notwithstanding the omission there of the clause in the previous Act, that if the statutory mode of transfer be not followed, "the transfer shall not be valid or effectual for any purpose whatever at law or in equity." The *Liverpool Borough Bank* v. *Turner*, 2 De G. F. & Jo. 502, affirming the decision of Sir *W. P. Wood*, V. C., 1 J. & H. 159; *M'Larty* v. *Middleton*, 9 W. R. (V. C. K.) 861. But see 25 & 26 Vict. c. 63, s. 3, since

which it has been decided that where there has been a complete transfer of a ship, there is nothing in the Act 17 & 18 Vict. c. 104, which prevents the transferor from shewing the real intention of the parties, viz.: that the instrument should operate as a security only for the money advanced, the absolute interest remaining in the transferor only: *Ward* v. *Beck*, 9 Jur. N. S. 912, 13 C. B. N. S. 668; and see *Stapleton* v. *Haymen*, 2 H. & C. 918; 12 W. R. (Exch.) 317.

And the provisions of the Ship Registry Acts were held to apply equally to contracts and to sales, and the whole frame of these Acts negative any equity resulting out of the doctrine of notice. Thus, in *M'Calmont* v. *Rankin*, 2 De G. Mac. & G. 403, it was held by Lord *St. Leonards*, C., that an unregistered agreement as to the sale of the ship, entered into with the plaintiffs by the registered owner of the ship, who subsequently transferred it for value to another person having notice of the agreement, could not be enforced, either as against the ship or its proceeds. "It was contended before me," said his Lordship, "as it was in the case of *Hughes* v. *Morris* (2 De G. Mac. & G. 349), that the contract to transfer, as in ordinary cases in this Court, is equivalent to an actual transfer of the property, but the moment such a proposition is enunciated, it is obnoxious to the rule provided by the Ship Registry Acts, which destroys its effect both at law and in equity. I think, therefore, I am entirely precluded from giving any relief as regards the transfer of the ship itself.

"Then it has been most elaborately argued, that I might and ought to give effect to the transaction as regards the proceeds of the vessel, although I cannot affect the vessel itself. I do not lay down any rule that parties cannot authorise a ship to be sold, and decree in what manner the money shall be applied. That is quite a different question. But the question before me is this: the plaintiffs claim the right under certain documents, which, they say, vests the property of the vessel in them, but for the Ship Registry Acts: and being forced to relinquish such right to the vessel they say they have an equity to that which represents the vessel, namely, the price produced by the sale of the vessel, and that a court of equity is bound to give effect to that claim. Can this Court give any relief as regards the proceeds of property which could not be given as against the property itself? There may be cases put, with regard to other transactions, in which the Court would follow the money, and would not follow the property, but I think the right to the money here must spring out of the right to the vessel. The right, if there was any right created, was to the

vessel, for the consignment was of the vessel, and the vessel, by its proceeds, no doubt, was to pay its debts; but before effect was given to that inchoate right, before it ever ripened into a perfect contract,—and while it was pending, —the party, who was in the act of giving effect to it, chose to prevent it from becoming a legal and binding contract. If it does not become a legal binding act, how can equity fix upon the proceeds of property, which by law has not become liable, and which, in fact legally belongs to somebody else? Suppose, for example, the defendants had now got the ship, and if, as is admitted, they would be entitled to retain her as long as she endures, or to make firewood of her, if they please, and the plaintiffs never could enforce their claim, it would be singular indeed, that though the property could be held in defiance of the rightful owner, and that no equity existed as regarded the property so long as it was kept in specie, yet that the moment that property was converted into money, the money might be demanded by the plaintiffs. What is that but indirectly breaking in upon the provisions of the Ship Registry Acts, and giving the plaintiffs a right or property in the vessel, though they cannot have the vessel itself? These Acts intended that the property in the vessel should go hand in hand with the right to the vessel, and that he who had the vessel should also have an equitable right to the property in the vessel. The cases, if it were necessary to go into them, would prove that. My clear opinion, therefore is, that the property in this ship did not pass to the plaintiffs, while it was in specie, and that being so, that the contract under the documents which have been produced does not give them the title which they now assert to the proceeds of that property."

The policy, however, of the Ship Registry Acts was held not to be in all cases applicable to contracts relative to the *proceeds* arising from the sale of ships, and to the produce of freight. Thus, in *Armstrong* v. *Armstrong*, 21 Beav. 78, shares in a British ship, purchased with his father's money, were registered in the name of the defendant, Armstrong. After the father's death, the defendant, Armstrong, entered into an agreement with his father's representatives, admitting their right, and, for valuable consideration, agreeing to sell the shares at the end of twelve months, and to account to the representatives for the proceeds. The ship was accordingly sold. It was held by Sir *John Romilly*, M. R., that, although the Ship Registry Acts prevented the representatives enforcing any right against the ship itself; still that they were entitled to recover the proceeds of the sale in the hands of the purchaser.

"My opinion," said his Honor, "is that the agreement here does not give any interest in the ship, but is an agreement that at the expiration of the period mentioned, the defendant Armstrong is to sell the shares and pay over the proceeds thereof according to the will of his father. That is exactly what Lord *St. Leonards* says in *M'Calmont* v. *Rankin*, 2 De G. Mac. & G. 424. I do not lay down any rule that parties cannot authorise a ship to be sold, and direct in what manner the money shall be applied . . . . . The result, is that, in my opinion, this is an agreement which is binding on the defendant Armstrong, that it is capable of being enforced in this Court, and that the money arising from the sale of the ship being now available, he is bound to account for it in the manner provided by this agreement." See and consider *Coombes* v. *Mansfield*, 3 Drew. 193; *Clarke* v. *Batters*, 1 K. & J. 242.

The Court has frequently stated that fraud might warrant its interference, but there is no case in the books in which the particular fraud which would create an interest in a ship has occurred. *M'Calmont* v. *Rankin*, 2 De G. Mac. & G. 416; *Armstrong* v. *Armstrong*, 21 Beav. 71, 87. It seems, however, that where a person having no title to a ship, procures it to be registered in his name, the Court of Chancery will compel him to re-transfer it to the rightful owner and account for the earnings, even though there has been no fraud, and notwithstanding "The Merchant's Shipping Act, 1854:" *Holderness* v. *Lamport*, 29 Beav. 129.

It was, moreover, decided at law, that an action would not lie for the breach of an *executory* contract for the sale or transfer of a ship, unless the contract contained a recital of the certificate of registry, pursuant to the 8 & 9 Vict. c. 89, s. 34: *Duncan* v. *Tindal*, 13 C. B. 258.

When the discharge of a mortgage on a ship has been duly registered, the mortgage cannot, without contravening the policy and provisions of the Merchant's Shipping Act, 1854 (17 & 18 Vict. c. 104), be revived on an allegation that the discharge was given by mistake, *Bell* v. *Blyth*, 4 L. R. Ch. App. 136, 139.

And the Court has jurisdiction to compel a specific performance by a foreigner to sell a foreign ship (*Hart* v. *Herwig*, 8 L. R. Ch. App. 860), and to restrain persons proceeding to remove the ship from this country: *Ib.*

The specific delivery of goods sold may now be enforced at law under the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97). See Day's Comm. Law Proc. Acts, 2nd ed., 305, 306; post p. 895.

An equitable defence to the enforcement of delivery of the chattel sold, might before the passing of the Judicature Act, 1873 (by

which law and equity are to be administered concurrently in all the divisions of the High Court of Justice, sect. 24), be set up; as for instance that the person employed to sell, sold it by mistake at one third of the price fixed upon it by the owner: *Isaac* v. *Boulnois*, 11 W. R. (Q. B.) 341.

The old Court of Bankruptcy had no jurisdiction to compel specific performance: *Ex parte Cutts*, 3 Deac. 242, overruling *Ex parte Sidebotham*, 1 Mont. & Ayr. 655; *Ex parte Barrington*, 2 Mont. & Ayr. 245. Whether the new courts have, has not yet been determined: Robs. Bkcy. 251.

2. *As to contracts relating to personal acts.*]—Although in some instances the line of demarcation between the cases already considered, principally relating to the sale of real and personal property, and some of the cases now about to be considered, is not quite clear; it is perhaps on the whole the most convenient which could be adopted.

And first with regard to contracts to do certain works. It appears that, notwithstanding some early decisions to the contrary (see 1 Madd. Ch. Pract. 361; *Buxton* v. *Lister*, 3 Atk. 385; *City of London* v. *Nash*, 6 Atk. 512, 1 Ves. 12), it is now settled that with some few exceptions the Court will not decree specific performance of contracts to build or repair (*Errington* v. *Aynesley*, 2 Bro. C. C. 341; 2 Dick. 692; *Lucas* v. *Commerford*, 3 Bro. C. C. 166; *Paxton* v. *Newton*, 2 Sm. & Giff. 437), to make a branch railway (*South Wales Railway Company* v. *Wythes*, 1 K. & J. 186, 5 De G. Mac. & G. 880), to work quarries (*Booth* v. *Pollard*, 4 Y. & C. Exch. 61), coal mines (*Pollard* v. *Clayton*, 1 K. & J. 462, and see Lord *Abinger* v. *Clayton*, 17 L. R. Eq. 358), to make good a gravel pit (*Flint* v. *Brandon*, 8 Ves. 159).

The principal reason why the Court does not decree specific performance in such cases is, the enormous inconvenience which would attend the operations of the Court, if it were to take upon itself, as between builders, contractors, railway companies and others, the erection and construction of a large number of buildings, and probably half the railways in the kingdom. See *The South Wales Railway Company* v. *Wythes*, 1 K. & J. 200.

Where, however, the performance of certain acts, such as making certain buildings or repairs, is merely incidental to a contract of which the specific performance would ordinarily be decreed, such as a contract to grant a lease, the Court will direct the contract for a lease to be specifically formed, and will, if necessary, direct an inquiry as to damages under Sir *Hugh Cairns'* Act, 21 & 22 Vict. c. 27, s. 2. In *Middleton* v. *Greenwood* (2 De G. Jo. & Sm. 142), the defendant agreed to grant the plaintiff a lease of a public-house, and to make and form

therein a spirit vault, and put in plate-glass windows, and do everything therewith necessary at his own expense, and paint new the outside of all the woodwork, as well as put the slates, chimney-pots and roofing in thorough repair. The Lords Justices of the Court of Appeal, affirming the decision of Sir *W. Page Wood*, V. C., directed specific performance of the agreement to grant the lease, and directed the inquiry as to damages for the non-performance of the agreement with respect to the vault, windows, painting, and repairs. See also *Kay* v. *Johnson*, 2 Hem. & Mill. 118; *Oxford* v. *Provand*, 2 L. R. P. C. 135; and see *Blackett* v. *Bates*, 2 Hem. & Mill. 270, where it was held that although a Court of Equity will not decree specific performance of an agreement to repair a railway simpliciter, it will do so if the agreement forms a collateral part only of a larger agreement, and the relation of lessee and lessor has been created between the parties. This case, however, was reversed on appeal by Lord *Cranworth*, C., 1 Law R. Ch. App. 117.

In the case of *Moseley* v. *Virgin*, 3 Ves. 185, Lord *Rosslyn* said, that if an agreement for building were in its nature defined, there would be no great difficulty in decreeing specific performance. And see Stor. Eq. Jur. s. 728; *Cubitt* v. *Smith*, 10 Jur. N. S. 1123.

But an agreement for building a house of a certain value is not one which the Court will direct to be specifically performed, for the Court would have great difficulty in determining whether its decree had or had not been performed, and it might lead to much litigation. See *Brace* v. *Wehnert*, 25 Beav. 348. There A. agreed to grant a lease to B. as soon as B. should have built a house with the necessary outbuildings on the land of the value of 1400*l.* at the least, "according to a plan to be submitted to and approved by A." B. agreed to build and take the lease. No plan had been approved of. It was held by Sir *J. Romilly*, M. R., that no decree could be made for specific performance, and a bill filed by A. for that purpose was dismissed with costs. And see *Norris* v. *Jackson*, 1 J. & H. 319.

At all events the Court has jurisdiction to enforce specific performance of a contract by a defendant to do defined work upon his own property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages: *Storer* v. *Great Western Railway Company*, 2 Y. & C. C. C. 48, where Sir *J. L. Knight Bruce*, V. C., made an order that the defendants, the company, were bound to construct and for ever thereafter to maintain one neat archway sufficient to permit a loaded carriage of hay to pass under the railway. So in *Franklyn* v. *Tuton*, 5 Madd. 469, the defendant was lessee from the plaintiff of certain building ground and covenanted that the house to

be built by her should correspond with the adjoining houses already built, in its elevation. The bill was to compel the defendant, who had not conformed to the covenant, to alter the elevation accordingly, and Sir *John Leach*, V. C., decreed according to the prayer of the bill.

A similar order was indirectly made by Lord *Eldon* in *Lane* v. *Newdigate*, 10 Ves. 192, where although he refused to make an order on the defendant specifically to repair the banks of a canal and stop-gates and other works, his Lordship nevertheless made an order by which the same effect was obtained, the defendant being restrained from impeding the plaintiff from navigating, using, and enjoying the canal, by continuing to keep the canal, banks, or works out of repair, by diverting the water, or continuing the removal of a stop-gate. See also *Sanderson* v. *Cockermouth and Workington Railway*, 11 Beav. 497; *Lytton* v. *Great Northern Railway Company*, 2 K. & J. 394; *Wilson* v. *Furness Railway Company*, 9 L. R. Eq. 28; *Attorney General* v. *Mid-Kent Railway Company and South Eastern Railway Company*, 3 L. R. Ch. App. 100; *Greene* v. *West Cheshire Railway Company*, 13 L. R. Eq. 44; *Cooke* v. *Chilcott*, 3 Ch. D. 694.

Another ground which makes a Court of equity more anxious to decree specific performance of a contract to do certain works, as to build or to make a road is, when the plaintiff, by reason of his having parted with his land to the defendant, has no opportunity of erecting the buildings at his own cost, and so ascertaining the amount of damages sustained by reason of the non-performance of the contract. *The South Wales Railway Company* v. *Wythes*, 1 K. & J. 200; and see *Price* v. *The Corporation of Penzance*, 4 Hare, 506; *Storer* v. *The Great Western Railway Company*, 3 Railw. Ca. 106, 2 Y. & C. C. C. 48; *Soames* v. *Edge*, Johns. 669; *Wilson* v. *Furness Railway Company*, 9 L. R. Eq. 28.

Again, where there have been acts amounting to a part performance of the contract, the Court will compel specific performance, which, without such acts, it might not do: *Price* v. *Corporation of Penzance*, 4 Hare, 506, 509; see also *Pembroke* v. *Thorpe*, 3 Swanst. 437, n.; *Sanderson* v. *Cockermouth and Workington Railway Company*, 11 Beav. 497; *Oxford* v. *Provand*, 2 L. R. P. C. 135; *Crook* v. *Corporation of Seaford*, 10 L. R. Eq. 678.

The tendency of the modern decisions where companies have contracted to perform certain works, and have got the whole benefit of the agreement, is to struggle with any amount of difficulties in order to compel specific performance. (*Wilson* v. *Furness Railway Company*, 9 L. R. Eq. 33), hence it has been held to be no defence to

a bill for specific performance, by a private individual against a railway company that, the public would be subjected to inconvenience if the company were compelled specifically to perform their contract with such individual. See *Raphael* v. *Thames Valley Railway Company*, 2 L. R. Ch. App. 147, there the plaintiff, a landowner, had withdrawn his opposition to a railway bill, in consideration of the company agreeing to make a road and an approach in a particular manner. The company altered the level of their line, and varied the course and inclination of the road. The bill was filed pending the works, and a motion for an injunction had been ordered to stand to the hearing, on the company undertaking to abide by the direction of the Court as to altering their works. It was held by Lord Chancellor *Chelmsford*, reversing the decision of Lord *Romilly*, M. R. (2 L. R. Eq. 37), that the plaintiff was entitled to specific performance; and that the company could not set up the inconvenience to the public by the interference with the traffic, as a reason for not performing their agreement. See also *Wilson* v. *Furness Railway Company*, 9 L. R. Eq. 28; *Attorney-General* v. *Mid-Kent Railway Company and South Eastern Railway Company*, 3 L. R. Ch. App. 100.

Nor was a Railway Company which had agreed to make a carriage road between certain points, on land conveyed to them by the plaintiffs, and to make and maintain a wharf for loading and discharging vessels at a specified place, allowed to set up the defence that the contract was ultra vires, or that the company was incorporated for making a railway, and not a public road (*Wilson* v. *Furness Railway Company*, 9 L. R. Eq. 28, 33), and where they had only partially fulfilled the agreement to set up as a defence the Statute of Limitations (*Ib.*), or that the Attorney-General was a necessary party, because where an agreement is with an individual, it is he, and not the Attorney-General, on behalf of the public, has a right to call for its performance, although the work to be done is for the benefit of the public. (*Ib.* 34.)

Where, however, more perfect and complete justice can be done by an award of damages, the Court will not decree specific performance of such contracts. See *Wilson* v. *Northampton and Banbury Junction Railway Company*, 9 L. R. Ch. App. 279. There a Railway Company agreed, for valuable consideration with a landowner, to erect, construct, and fit up, a station on certain lands, which they had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The company having refused to erect a station in the specified place, and substi-

tuted one at a distance of two miles, it was held by the Court of Appeal in Chancery, affirming the decision of Sir *James Bacon*, V. C., that justice could be better done by an inquiry in chambers as to damages, than by a decree for specific performance. "In the case of damages," said Lord *Selborne*, L. C., "the plaintiff will be entitled to the benefit of such presumptions as, according to the rules of law, are made in courts both of law and equity against persons who are wrong-doers in the sense of refusing to perform, and not performing their agreements. We know it to be an established maxim, that in assessing damages, every reasonable presumption may be made as to the benefit which the other parties might have obtained by the bonâ fide performance of the agreement. On the same principle, no doubt, in the celebrated case of the diamond which had disappeared from its setting, and was not forthcoming, a great judge directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there. I do not say that that analogy is to be followed here to the letter; the principle is to be reasonably applied, according to the circumstances of each case. So applying it to the circumstances of the present case, it appears to me that a jury might, with perfect propriety, take into account the probable benefit which the plaintiff's estate might have derived from the existence of a stopping-place on the line, to which traffic might have been attracted, or which might have been convenient to the persons resident upon that estate. They might take into account the reasonable probability that if the company had bonâ fide performed the agreement, they would have made the station in a reasonable manner as regards the mode of construction and the extent of accommodation; and they might also take into account the reasonable probability, that if the company had made the station, they would, in their own interest, have thought it worth while to make a reasonable use of it. All those are elements, no doubt, more or less of an indefinite character, but proper for the consideration of a jury on the question of damages, and proper for the consideration of this Court, when it discharges the function of a jury."

It seems that as a general rule Courts of equity will not decree a specific performance of an agreement to enter into and carry on a partnership: (per Sir *G. M. Giffard*, V. C., in *Scott* v. *Rayment*, 7 L. R. Eq. 112.) A fortiori where the sole relief sought is the payment of a sum of money. *Bagnell* v. *Edwards*, 10 Ir. R. Eq. 215. There are, however, some very limited exceptions to the rule, such for instance as the Court

going the length of decreeing the execution of a deed (*Ib.*), in cases where it was essential to the ends of justice that the status of the parties should be ascertained, determined, and fixed; and there has been a part performance of the contract to enter into partnership for a fixed and definite term (*Anon.*, 2 Ves. 629; *England* v. *Curling*, 8 Beav. 129; *Hibbert* v. *Hibbert*, Coll. on Partnership, p. 133); but it will not do so when the amount of capital and the mode by which it is to be provided is undefined (*Downs* v. *Collins*, 6 Hare, 418, 437); nor will it do so when no term has been fixed for the duration of the partnership, for such a decree would be useless when either of the parties might dissolve the partnership immediately afterwards: *Hercy* v. *Birch*, 9 Ves. 357; and see *Sheffield Gas Consumers' Company* v. *Harrison*, 17 Beav. 294. It has, however, been suggested by Mr. Swanston in his learned note to *Crawshay* v. *Maule*, 1 Swanst. 513, that in many cases, although the partnership could be immediately dissolved, the performance of the agreement, like the execution of a lease, after the expiration of the term (see *Nesbitt* v. *Meyer*, 1 Swanst. 226), might be important as investing the party with legal rights for which he had contracted.

For a decree made on a Bill for a specific performance of an agreement for a partnership at will (in consideration of a sum of money), and which was determined by the defendant's answer. See *Syers* v. *Syers*, 1 App. Cas. 174, 192, 193, 194.

Upon the same principle the Court will not decree specific performance of a contract to grant a lease, when a lease, if granted, might be determined at once for the breach of a covenant which the plaintiff had already broken: *Jones* v. *Jones*, 12 Ves. 188.

The Court has refused to grant specific performance of an agreement for a tenancy from year to year, upon the ground apparently that the remedy at law was adequate: *Clayton* v. *Illingworth*, 10 Hare, 451.

Again, as contracts of hiring and service are of a confidential character, and cannot therefore be enforced against an unwilling party with any hope of ultimate success, courts of equity, although a different opinion was formerly entertained (*Ball* v. *Coggs*, 1 Bro. P. C. 140, Toml. Ed.; *East India Company* v. *Vincent*, 2 Atk. 83), now refuse to decree specific performance of them: *Johnson* v. *Shrewsbury and Birmingham Railway Company*, 3 De G. Mac. & G. 914; *Horne* v. *The London and North Western Railway Company*, 10 W. R. (V. C. W.) 170; *Pickering* v. *Bishop of Ely*, 2 Y. & C. C. C. 249; so in *Stocker* v. *Brocklebank*, 3 Mac. & G. 250; *Brett* v. *The East India and London Shipping Company, Limited*, 12 W. R.

(V. C. W.) 596; *Mair* v. *Himalaya Tea Company*, 1 L. R. Eq. 411.

The specific performance of a contract of agency will not be enforced in equity. Thus in *Chinnock* v. *Sainsbury*, 30 L. J. N. S. (Ch.) 409, auctioneers advanced a sum of money to J. S., who agreed to put a miscellaneous collection of property into their hands for sale, from the proceeds of which they were to retain the money advanced. A part only of the property was delivered and sold, but it realised less than the sum advanced. J. S. refused to part with the remainder of his collection, and upon demurrer to a bill for a specific performance of the agreement, it was held by Sir *J. Romilly*, M. R., that the Court would not compel the performance of a contract of agency; that J. S., if he satisfied the claims of his agents, was at liberty to countermand the sale of his property; that the advance of money to J. S. was not made on the security of the property mentioned in the contract; and that the claims of the agents must be determined in a court of law, and the demurrer was allowed.

The Court will not decree specific performance of a contract for the sale of the goodwill of a business unconnected with the premises where the business is carried on (*Baxter* v. *Conolly*, 1 J. & W. 576; *Bozon* v. *Farlow*, 1 Mer. 459, 474); but where the goodwill is altogether or principally annexed to the premises, a contract for the sale of the goodwill and premises may be enforced in equity: *Cruttwell* v. *Lye*, 17 Ves. 335; *Shackle* v. *Baker*, 14 Beav. 468; *Chissum* v. *Dewes*, 5 Russ. 29; *Darbey* v. *Whitaker*, 4 Drew. 134, 139, 140.

And although at one time it was doubtful whether a contract for the sale of the business of an attorney was legal (see *Candler* v. *Candler*, Jac. 231; *Bozon* v. *Farlow*, 1 Mer. 459; *Thornbury* v. *Bevill*, 1 Y. & C. C. C. 554; *Gilfillan* v. *Henderson*, 2 C. & F. 1), it seems now that it is held valid at law (*Bunn* v. *Guy*, 4 East. 190), and will be enforced in equity: *Whittaker* v. *Howe*, 3 Beav. 383; *Aubin* v. *Holt*, 2 K. & J. 66.

A Court of equity will compel specific performance of agreements for separation between husband and wife, by decreeing the execution of proper deeds of separation, provided there be a good consideration to support the contract, as, for instance, a covenant by trustees to indemnify the husband against the wife's debts (*Stephens* v. *Olive*, 2 Bro. C. C. 90; *Earl of Westmeath* v. *Countess of Westmeath*, Jac. 126, 141; *Elworthy* v. *Bird*, 2 S. & S. 372, and see *Wellesley* v. *Wellesley*, 10 Sim. 256), or a covenant by a third person to pay the husband's debts: *Wilson* v. *Wilson*, 1 Ho. Lo. Ca. 538; 5 Ho. Lo. 40. So, the staying by the wife of a suit in

the Ecclesiastical Court for nullity of marriage against her husband on the ground of impotency (*Wilson* v. *Wilson*, 14 Sim. 405, 1 Ho. Lo. Ca. 538), or her acceptance of maintenance from her husband instead of proceeding against him by a divorce a mensâ et thoro (*Hobbs* v. *Hull*, 1 Cox, 445), has been held a good consideration as against him. And the Court will also compel the husband by injunction, pursuant to his covenant, not personally to molest his wife: *Sanders* v. *Rodway*, 22 L. J. (N. S.) Ch. 230, although it seems doubtful whether it would have restrained proceedings in a suit for a restitution of conjugal rights: *Wilkes* v. *Wilkes*, 2 Dick. 791; *Vansittart* v. *Vansittart*, 4 K. & J. 62; *Hope* v. *Hope*, 8 De G. Mac. & G. 731. But see now the Judicature Act, 1873, s. 24, subsect. 5.

A Court of equity will not decree the specific performance of a covenant to refer disputes to arbitration (*Price* v. *Williams*, cited 6 Ves. 818; *Street* v. *Rigby*, 6 Ves. 815; *Wilks* v. *Davis*, 3 Mer. 507; *Gervais* v. *Edwards*, 2 Dr. & W. 80), and a plea of an agreement to refer to arbitration will not constitute a valid objection to a bill either for discovery only or for discovery and relief (*Wellington* v. *Mackintosh*, 2 Atk. 569; *Street* v. *Rigby*, 6 Ves. 815, overruling *Halfhide* v. *Fenning*, 2 Bro. C. C. 336; *Dimsdale* v. *Robertson*, 2 J. & Lat. 58, 91; but see and consider *The British Empire Shipping Company* v. *Somes*, 3 K. & J. 433; *S. C.*, nom. *Somes* v. *The British Empire Shipping Company*, 8 Ho. Lo. Ca. 338); although before the bill was filed arbitrators were appointed, and since the bill was filed the submission has been made a rule of Court (*Cooke* v. *Cooke*, 4 L. R. Eq. 77); nor could the Court substitute the Master for the arbitrators, "for this," observed Sir *J. Leach*, "would be to bind the parties contrary to their agreement:" *Agar* v. *Macklew*, 2 Sim. & Stu. 418.

But it seems to be doubtful, if the agreement to submit to arbitration contains also a covenant not to take proceedings at law or in equity, whether, in that case, the submission may not be pleaded in bar of proceedings in any superior Court: *Halfhide* v. *Fenning*, 2 Bro. C. C. 336; 2 Dick. 702; *Dimsdale* v. *Robertson*, 2 J. & Lat. 58, 91; and see *Cooke* v. *Cooke*, 4 L. R. Eq. 77.

Where there is in a contract an agreement to refer matters in dispute to arbitration, under the Common Law Procedure Act (17 & 18 Vict. c. 125), a Court of equity, although it may have jurisdiction to decide the question in issue, will on motion stay proceedings under the Bill, and refer the matters in dispute to arbitration, according to the terms of the Act. See *Willesford* v. *Watson*, 14 L. R. Eq. 572. There a mining

lease contained a clause that whenever any dispute should arise touching, inter alia, the working of the mine, or compensation to be paid, or anything to be done under the covenant, or touching the rights or duties of either party, the matter in difference should be referred to two arbitrators or their umpire in conformity with the Act (17 & 18 Vict. c. 125). Sir *J. Wickens*, V. C., under the 11th sect. of the Act, on the defendants' motion, stayed proceedings on a Bill, filed by the lessors, praying for an injunction to restrain workings, alleged to be improper, and an account, and directed a reference. "So far as I can discover," said his Honor, "no order to the effect asked for has ever been made by the Court of Chancery; at least there is no reported case in which such an order has been made, though such an order has been sometimes asked for and refused. In *Wheatley* v. *Westminster Brymbo Coal and Coke Company* (2 Dr. & Sm. 347), the Vice-Chancellor *Kindersley* seems to have refused the order very unwillingly, and on special grounds, which in no degree apply to this case. Such orders have been very frequently made by Courts of Law. The construction which these Courts have put on the clause seems to have been *that whenever the agreement to refer covers the question* which the action raises, the matter should be referred, even although it is properly one of law, and even though the defendant's case may be properly raiseable in a cross action; in fact, in all cases, except where there is a question of actual fraud. In cases of actual fraud the Court refuses to interfere on two grounds: First, because when personal fraud is in issue the case is properly one of publicity, and for a jury; and, secondly, because the parties to a contract can hardly be supposed to have endeavoured to refer to a conventional tribunal any attempt by one of them to cheat the other. But in all other cases the Courts of Law seem to consider that the defendant is entitled to the reference when he once has shewn that the point is one which the plaintiff agreed to refer. Here the question raised appears to me within the reasonable and fair construction of the clause of reference; and there is no case of actual fraud on either side. The only question is whether there are other special grounds for refusing the stay of proceedings, to which the defendant is primâ facie entitled. Following the decisions, I must consider it as wholly *immaterial that the Court of Chancery might be a cheaper, quicker, or* more competent tribunal than the conventional one. The parties knew this, if it be so, when they entered into the contract. According to the decisions of the Courts of Law, in the correctness of which I fully concur, the act,

in all but the excepted cases, has taken the general question of the expediency or fitness of the tribunal, out of the purview of the Court to which the application is made. This seems the true answer to what was so much insisted on by the plaintiffs, and which struck me at the time as an argument deserving much attention, namely, that the arbitrators could grant no injunction, and that, therefore, I could not make the order without deciding against the plaintiff's title in that respect. If the parties agreed to refer the consequences of their contract to a court which could grant no injunction, they did so knowingly, and must be bound by it. The case is, no doubt, different where the suit, that it is desired to stay, seeks for a receiver, which is an intervention of this Court for the purpose, not of determining anything between the parties, but of keeping things intact while the dispute is being determined, or such special intervention as a ne exeat, or an injunction answering the same purpose as a receiver does; that is, of keeping matters in statu quo. The injunction here sought is not for the purpose of keeping the matter intact till the dispute is determined, but a mode of giving to the plaintiff the benefit of a determination if made in his favour. Probably on an analogous ground, the Court might refuse to stay a suit which sought rectification, since the power of rectifying is one which cannot be relegated. But it is not to be overlooked that the case for rectification, if there be one here, is the case of the defendants, who apply for the stay, and not that of the plaintiffs, who resist it. Upon appeal his Honor's decision was affirmed by the full Court: 8 L. R. Ch. App. 473. See also *Plews* v. *Baker*, 16 L. R. Eq. 564; *Gillett* v. *Thornton*, 19 L. R. Eq. 599.

Where there is a contract for a sale at a price to be determined upon by certain persons as valuers, the Court, unless the price be fixed in the manner determined upon, so as to be made part of the agreement, will not ordinarily decree specific performance thereof (*Milnes* v. *Gery*, 14 Ves. 400; *Wilkes* v. *Davis*, 3 Mer. 507; *Vickers* v. *Vickers*, 4 L. R. Eq. 529; *Collins* v. *Collins*, 26 Beav. 306; *Richardson* v. *Smith*, 5 L. R. Ch. App. 648), and it is immaterial whether the price has not been ascertained, in consequence of the failure of the nomination of the valuers, or if, when appointed, they do not make their award, or one of the parties will not allow his valuer to proceed (*Ib.*), the Court refusing to act, because the contract is not complete. "The Court has adopted this principle from the civil law as stated in the Code of Justinian, who seems to have taken pride in having decided a point which he said was a knotty point, and had occasioned

great controversy among lawyers —namely, if a given man is to name the price, whether that is to be considered as equivalent to the arbitrium boni viri. The Emperor Justinian determined that if Titus be unable or unwilling to declare the price, the sale is null:" per Sir *W. Page Wood*, V.-C., in *Vickers* v. *Vickers*, 4 L. R. Eq. 535; and see Inst. 3, 24, 1; Cod. 4, 38, 15.

Where the agreement which has been rendered impossible of performance by the death of the arbitrator, is an agreement which has been substituted for a former one, not dependent upon the award of the arbitrator, the Court of Equity, at any rate where there has been a part-performance, may make a decree for performance of the original agreement: *Firth* v. *Midland Railway Company*, 20 L. R. Eq. 100.

Where, however, the vendor refuses to allow a valuer to enter into his house for the purpose of making a valuation, the Court will make a mandatory order to compel the vendor to allow him to enter, and to enable the valuation to proceed: *Smith* v. *Peters*, 20 L. R. Eq. 511.

Where the fixing a value by arbitrators is not of the essence of an agreement, the Court will carry the agreement into effect, and will, itself, if necessary, ascertain the value. See *Dinham* v. *Bradford*, 5 L. R. Ch. App. 519: there two partners made an agreement containing a provision that on the determination of the partnership one partner should purchase the share of the other at a valuation to be made by two persons, one appointed by each partner, and the partnership was carried on for some time under that agreement. It was held by Lord *Hatherley*, L. J., affirming the decision of Sir *John Stuart*, V.-C., that though the valuation could not be made, because no umpire was provided, the Court would carry the partnership agreement into effect by ascertaining the value of the share. "This case," said his Lordship, "is not like that of the sale of an estate, the price of which is to be settled by arbitration; but is a case in which the whole scope and object of the deed would be entirely frustrated if the Court were to apply the well-known doctrine to the present state of circumstances. In cases of specific performance the matter is very plain and simple. One person agrees to sell his estate in a given way, and no rights are changed by the circumstance of that method of selling the estate having failed. The estate remains where it was, and the money where it was. But here is a man who has had the whole benefit of the partnership in respect of which this agreement was made, and now he refuses to have the rest of the agreement performed, on account of the difficulty which has arisen.

It is much more like the case of an estate sold, and the timber on a part to be taken at a valuation, the adjusting of matters of that sort forming part of the arrangement, but being by no means the substance of the agreement; and in such cases the Court has found no difficulty. If the valuation cannot be made modo et formâ, the Court will substitute itself for the arbitrators. It is not the very essence and substance of the contract, so that no contract can be made out except through the medium of the arbitrators. Here the property has been had and enjoyed, and the only question now is, what is right and proper to be done with regard to settling the price?" *Jackson* v. *Jackson*, 1 Sm. & G. 184.

An inequitable refusal, however, of a plaintiff to submit to arbitration according to contract, may disentitle him to relief in equity: *Cheslyn* v. *Dalby*, 2 Y. & C. Exch. Ca. 170.

The Court will decree specific performance of an award, where it is to do anything in specie, as to convey an estate or assign securities (*Norton* v. *Mascall*, 2 Vern. 24; *Hall* v. *Hardy*, 3 P. Wms. 187), but not, it seems, an award to pay money: *Hall* v. *Hardy*, 3 P. Wms. 189, note.

The Court thus exercises jurisdiction, "because," to use Lord *Eldon's* language, "the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person:" *Wood* v. *Griffith*, 1 Swanst. 54. See, also, *Nickels* v. *Hancock*, 7 De G. Mac. & G. 300.

The right of a person to have specific performance of an award is the same as if the award had been an agreement between the parties, and the Court will not decree specific performance of an award in a case where, if the award had been an agreement; specific performance would have been refused. See *Blackett* v. *Bates*, 1 Law Rep. Ch. App. 117; there, by an award made in June, 1863, under a reference at Nisi Prius, the arbitrator awarded that the defendant should execute to the plaintiff a lease of the right to use such part of a certain railway made by the plaintiff as was upon the land of the defendant, the lease to be made in the words set out in the award; and that the defendant should have a right of running carriages on the whole line on certain terms, and might require the plaintiff to supply engine power, while the plaintiff should have an engine on the railway; and that the plaintiff should during the term keep the whole railway in good repair. The lease did not provide for these privileges awarded to the defendant. The plaintiff applied at law to set aside the award, and ultimately in April, 1864, the application was refused. In July,

1864, the plaintiff filed his bill for specific performance of the award. It was held by Lord *Cranworth*, C., reversing the decree of Sir *W. Page Wood*, V.-C. (2 H. & M. 270), that specific performance could not be decreed, inasmuch as the provisions in favour of the defendant could not be enforced at once, but gave the defendant a right to have certain duties continuously performed by the plaintiff for a number of years, and the Court could not see to such performance. "The rights of the parties," said his Lordship, "in respect of specific performance are the same as if the award had been simply an agreement between them. Had it been an agreement, would there have been a case for specific performance? I think not; and for this short and simple reason—that the Court does not grant specific performance unless it can give full relief to both parties. Here the plaintiff gets at once what he seeks—the lease; but the defendant cannot get what he is entitled to, for his right is not a right to something which can be performed at once, but a right to enforce the performance by the plaintiff of daily duties during the whole term of the lease. The Court has no means of enforcing the performance of these duties—all it can do is to punish the plaintiff by imprisonment or fine, if he does not perform them. . . . . If the arbitrator instead of awarding that the plaintiff should do certain acts, had awarded that the lease to be executed should contain covenants by the plaintiff to do them, the case would have stood on an entirely different footing. The Court would not then have been called upon to enforce, either directly or indirectly, the doing of those acts, but merely to decree the execution of a lease containing certain covenants, a kind of relief, which is clearly within the jurisdiction of the Court, and open to no objection."

And the jurisdiction of Courts of Equity to decree specific performance of awards has not been ousted by the 17th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). Ib. And see Dart. V. & P. 224, 5th edit.

Specific performance compelled by injunction.]—Where a person has entered into a contract for valuable consideration not to do a thing, specific performance of such negative contract will be enforced by an injunction restraining him from doing anything in contravention of it. Thus a Court of Equity has restrained parties from ringing a bell (*Martin* v. *Nutkin*, 2 P. Wms. 266), carrying on a trade (*Barret* v. *Blagrave*, 5 Ves. 555; *S. C.*, 6 Ves. 104; *Williams* v. *Williams*, 2 Swanst. 253; 3 Mer. 157; and see *Shackle* v. *Baker*, 14 Ves. 468; *Crattwell* v. *Lye*, 17 Ves. 335; *Newbery* v. *James*, 2 Mer. 446;

Harrison v. *Gardner*, 2 Madd. 198), allowing the sale of certain specified classes of goods in contravention of an exclusive right to sell such goods conferred upon another (*Altman* v. *Royal Aquarium Society*, 3 Ch. D. 228), acting on the stage (*Anon.*, 6 Sim. 351 cited, *Lumley* v. *Wagner*, 1 De G. Mac. & G. 604; *Montague* v. *Flockton*, 16 L. R. Eq. 189), carrying on a particular trade in a certain place or district (*Clements* v. *Welles*, 1 Law Rep. Eq. 200; *Clarkson* v. *Edge*, 12 W. R. (M. R.) 518. See, also, *Fielden* v. *Slater*, 7 L. R. Eq. 523; *Jones* v. *Bone*, 9 L. R. Eq. 674: *Carter* v. *Williams*, Ib. 678), even in the case of an infant if he represented himself to be of full age (*Cornwall* v. *Hawkins*, 41 L. J. (N. S.) 435), erecting buildings (*Rankin* v. *Huskisson*, 4 Sim. 13, *Lord Manners* v. *Johnson*, 1 Ch. D. 673), or buildings above a certain height (*Lloyd* v. *London, Chatham and Dover Railway Company*, 2 De. G. Jo. & Sm. 568; *Bowes* v. *Law*, 9 L. R. Eq. 636), or making applications to parliament (*Ware* v. *Grand Junction Waterworks Company*, 2 Russ. & My. 470, 483; *Heathcote* v. *North Staffordshire Railway Company*, 2 Mac. & G. 100; *Lancaster and Carlisle Railway Company* v. *North Western Railway Company*, 2 K. & J. 293), contrary to an agreement not to do such acts. See *Taylor* v. *Davis*, 3 Beav. 388 n.

Upon the same principle a railway company has been restrained from allowing, contrary to its contract with a landowner, any of its ordinary or fast trains, other than mail, express, or special trains, to pass a station without staying there for the purpose of taking up and setting down passengers: *Hood* v. *North Eastern Railway Company*, 8 L. R. Eq. 666; 5 L. R. Ch. App. 525. See, also *Rigby* v. *The Great Western Railway Company*, 15 L. J. N. S. 266: 2 Ph. 44. See, also, *Phillips* v. *Great Western Railway Company*, 7 L. R. Ch. App. 409.

But the Court will not by injunction compel the doing of something which involves continuous employment for an indefinite period. See *Powell Duffryn Steam Coal Company* v. *Taff Vale Railway Co.*, 9 L. R. Ch. App. 331. There the plaintiffs had power to run engines and carriages over part of the defendants' line of railway, under the powers of the Railway Clauses Act, 1845, s. 92. The defendants refused to allow the plaintiffs to exercise this power. Whereupon the plaintiffs filed a Bill, praying for an injunction to restrain the defendants from interfering with their use of the railway. It was held by the Lords Justices affirming the decision of Sir *Charles Hall*, V.-C., that the Bill should be dismissed without costs. "True it is," said Lord Justice *James*, "that under the 76th and

92nd sections of the Railways Clauses Consolidation Act, the plaintiffs appear to have the right given to them of using this railway with their engines, but, as pointed out by Vice-Chancellor *Wickens*, and afterwards by Vice-Chancellor *Hall*, it is impossible for them to exercise that right without danger, unless there is a continuous use of the signals and of the points by the defendants' own people. Now it is, I think, impossible to say that a Company ought to be compelled by this Court to trust its points and signals, upon which so much of the safety of mankind now depends, to any other persons than its own pointsmen and its own signalmen. If, therefore, relief is given to the plaintiffs, it must in substance involve ordering the defendants to work the points and signals. But it is not the practice of this Court to compel by injunction either a Company or an individual to do a continuous act which requires the continuous employment of people. The Court will in a proper case restrain a man from singing at one theatre, but it will not undertake to compel him to sing at another; it may restrain him from writing a book for one publisher, but it cannot compel him to write a book for another. Where what is required is not merely to restrain a party from doing an act of wrong, but *to oblige him to do some continuous* act involving labour and care, the Court has never found its way to do this by injunction."

But it seems that a Court of Equity will not grant an injunction restraining the doing of an act contrary to a stipulation, which is merely ancillary to an agreement of which the Court cannot compel the specific performance. See *Merchants' Trading Company* v. *Banner*, 12 L. R. Eq. 18; there a firm of shipbuilders agreed to alter a vessel according to a specification, and it was provided that in case of their failure to execute the alterations according to the agreement, the owners of the vessel should be at liberty, with workmen, to enter on the shipbuilders' yard, and themselves complete the alterations. The shipbuilders were adjudicated bankrupts before the vessel was completed. Upon a bill filed by the owners against the trustee under the bankruptcy, praying a declaration that the plaintiffs were entitled to complete the alterations in the vessel, and asking for an injunction to restrain the defendant from selling the dock in which the vessel was lying, or interfering with the right of the plaintiff to complete the vessel, Lord *Romilly*, M. R., allowed a demurrer to the bill. "The real principle," said his Lordship, "is that where the stipulation sought to be enforced is really a part of the contract itself, this Court cannot specifically perform the

contract piecemeal, but it must be performed in its entirety if performed at all; and where the Court cannot perform it in its entirety, neither can it perform any particular portion of it."

Nor will the Court restrain a person from doing an act contrary to an agreement, when the plaintiff himself has already broken part of the same agreement which he seeks to enforce. See *Telegraph Despatch and Intelligence Company* v. *M'Lean*, 8 L. R. Ch. App. 658, *Fechter* v. *Montgomery*, 33 Beav. 22.

3. *As to the extension of the jurisdiction of equity in matters of specific performance by the legislature conferring power to award damages in certain cases.*]—The jurisdiction of the Court of Chancery with regard to specific performance, was much enlarged by the Chancery Amendment Act, 21 & 22 Vict. c. 27 (Lord *Cairns'* Act), which took effect from and after the 1st of November, 1858. It enacts that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct. Sect. 2. Subsequent sections provide the machinery for the assessment of damages and the trial of questions of fact either by a jury before the Court itself, or by the Court alone (sects. 3, 4, 5), or for the assessment of damages by a jury before any judge of one of the superior courts of common law, at nisi prius, or before the sheriff of any county or city. Sect. 6.

This Act, which is not retrospective (*Wicks* v. *Hunt*, Johns. 372, 380), does not extend the jurisdiction of the Court to cases where there was a plain common law remedy, and where the Court would not have interfered before the passing of the Act.—*Ib.*

The Court, therefore, could not under the Act award damages save in cases where it had jurisdiction to decree specific performance, and in addition to or substitution for that remedy. Hence it has been decided that as a Court of equity had no jurisdiction to compel specific performance of an agreement to borrow a sum of money, it could not award compensation or damages against a person who had refused to accept a loan of money for which he had contracted. *Rogers* v. *Challis*, 27 Beav. 175. So as the Court would not compel specific performance of an agency contract, it could not

grant damages for the breach of such contract, *Chinnock* v. *Sainsbury*, 30 L. J., N. S. Ch. 409. See, also, *Scott* v. *Rayment*, 7 L. R. Eq. 112.

So where the plaintiff fails to establish any covenant, contract, or agreement of which specific performance can be directed, the Court has under the Act no jurisdiction to grant relief in damages; *Lewers* v. *The Earl of Shaftesbury*, 2 L. R. Eq. 270.

Where the Court, however, has jurisdiction to grant specific performance, it may award damages for non-performance of part of the contract, in respect of which it could not have compelled specific performance. Thus, in *Soames* v. *Edge*, Johns. 669, the plaintiff agreed to grant a lease to the defendant when, and so soon as he, the defendant, should have built a new house on the land; and the defendant agreed to accept such lease when required, and by a certain day to pull down an old house then standing on the land, and build a new one on the site. The defendant, who was previously in the occupation of the premises, in pursuance and part performance of the agreement, caused the old house to be pulled down, and sold the materials and continued in possession, and paid part of the rent which accrued due, but did not proceed to build a new house upon the old site. It was held by Sir *W. Page Wood*, V.-C., on demurrer to a bill praying specific performance and damages, that Lord *Cairns'* Act applied, and that the plaintiff was entitled to damages for the non-building of the house, and to specific performance of the contract to accept the lease. "It is perfectly true," said his Honor, "that I cannot act until I have jurisdiction, and under the existing law, before the passing of this Act (Lord *Cairns'*), a Court of equity had not jurisdiction in respect of a building contract of this description. But it would have had jurisdiction, before the passing of the Act, to compel the defendant to accept a lease on the plaintiff waiving the condition which he for his own benefit inserted, that he should not be called upon to grant a lease until a certain time. The defendant has agreed to accept a lease when required, *and the Court has therefore jurisdiction.* The statute would not apply to a case where the object of the agreement was, simply, the building of the house under such conditions and on such terms that it may be assumed the Court could not grant specific performance; and in such a case a plaintiff could not file a bill to have damages instead of specific performance, because there would be no jurisdiction. But there is a distinct agreement here, not only to build the house, but to accept the lease. *The Court, having, therefore, acquired jurisdiction,* may give damages either in addition to or in substitution for

specific performance. The meaning of the statute can only be, that where the Court has jurisdiction in the suit, it may award damages in substitution for specific performance. . . . This is a case above all others in which this very beneficial act should be applied. Here is a person in possession, who has pulled down the house, and remains in possession, and refuses to do that upon which the plaintiff would be bound to grant a lease. The plaintiff says, 'I want my house built, or damages for the default; and then I require you to accept a lease.' The demurrer must be overruled with costs."

But a plaintiff will not be entitled to damages if he has done any act which would disentitle him to specific performance: *Collins* v. *Stuteley*, 7 W. R. (M. R.) 710.

The power to give damages under this Act is discretionary, and the Court has refused to give damages where the question of damages could be more satisfactorily tried at law: *Durell* v. *Pritchard*, 1 L. R. Ch. App. 244.

The object of Lord *Cairns*' Act, it will be seen, is to enable the Court of Chancery to do complete justice in cases where it previously had jurisdiction, but where circumstances had occurred which disabled the Court from decreeing specific performance, and so rendered it necessary for the plaintiff to seek relief in a court of law for damages. If, for instance, before the passing of the Act, upon a bill being filed for the specific performance of a contract for the purchase of an estate, it appeared that the vendor could not make a title to the estate, the bill would have been dismissed, and the vendor would have been obliged to resort to a court of law for damages; under the Act, the Court of Chancery is able to do complete justice between the parties—by the award of adequate damages for the non-performance of the contract.

As Lord *Cairns*' Act does not diminish the rights of suitors, a plaintiff in equity, who, before the Act, would have been allowed at the same time to sue the defendant at law for damages, may still do so, although he might, under the Act, pray for and obtain damages in the suit. See *Anglo-Danubian Company* v. *Rogerson*, 4 L. R. Eq. 3; there A. filed a bill against B., for the cancellation of bills of exchange, drawn by B. and accepted by A., in part performance of a contract, of which B. failed to perform his part, and for an injunction to restrain B. from parting with or suing on the bills; and pending the suit, A. commenced an action against B. for damages for breach of the contract. It was held by Lord *Romilly*, M. R., that the suit and action were not for the same matter, and an order to elect obtained by B. was discharged.

Under *Rolt's Act* (25 & 26 Vict.

c. 42), the Court of Chancery must determine every question of law and fact incident to the relief sought.

Agreements for leases are within the 4th clause of the 1st section of the County Court Equity Act, authorising decrees for specific performance : *Wilcox* v. *Marshall*, 3 L. R. Eq. 270.

It may be here mentioned, that under the Judicature Act, 1873, (36 & 37 Vict. c. 66), s. 34, all causes and matters for the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases, are assigned to the Chancery Division of the High Court of Justice.

Another division of the High Court of Justice may in a proper case transfer a cause in which a question of specific performance arises, to the Chancery Division. See *Hilman* v. *Mayhew*, 1 Exch. D. 132, there, to an action in the Exchequer Division to recover possession of land, the defendant set up a counter-claim for specific performance of a contract for a lease. It was held by the Court of Exchequer that, since it appeared on the facts that there was a *primâ facie* case for specific performance, which, under the old practice before the Judicature Act, would have entitled the present defendant on a Bill for specific performance to an injunction to restrain the action, and since the question of specific performance could be more conveniently disposed of in the Chancery Division, the action ought to be transferred thereto.

PUSEY *v.* PUSEY.

De Term. S. Mich. 20*th November*, 1684.

Reg. Lib. 1684, B., fol. 310.

[REPORTED 1 VERN. 273.]

SPECIFIC DELIVERY UP OF CHATTELS.]—*Land held by the tenure of a horn. Bill brought by the heir for the horn.*

BILL was, that a horn, which, time out of mind, had gone along with the plaintiff's estate, and was delivered to his ancestors in ancient time to hold their land by, might be delivered to him; upon which horn was this inscription, viz., *pecote this horne to hold luy thy land* (*a*).

The defendant answered as to part, and demurred as to the other part; and the demurrer was, that the plaintiff did not by his bill pretend to be entitled to this *horn* either as executor or devisee; nor had he in his bill charged it to be an *heir-loome*.

The demurrer was overruled, because the defendant had not fully answered all the particular charges in the bill, and was ordered to pay costs. And the LORD KEEPER GUILDFORD was of opinion, that if the land was held by the tenure of a *horn* or *cornage*, the heir would be well entitled to the horn at law. *Vide* 1 Inst. 107 a.

(*a*) Camden, speaking of the manor of Pusey, says, "the family of Pusey still hold it by a horn, anciently given to their ancestors by Canute, the Danish king." (Camd. Brit. Berks, p. 203, ed. 1607). Dr. Hicks gives the inscription as follows (see Thes. Præf, p. xxv.):—

"I Kynd
Knowd geve
Wyllyam
Pecote
Thys horne to
hold by thy
lond."

The name "Pecote," however, seems to be a mistake, and should be written "Pewse." The real inscription runs thus—

"Kyng Knowd geve Wyllyam Pewse
This horne to hold by thy lond."—Archæologia, vol. 3, p. 13, 14.

DUKE OF SOMERSET *v.* COOKSON.

De Term. S. Mich. 1735.

2 Eq. Ca. Abr. 164, pl. 28.

[REPORTED 3 P. WMS. 389.]

SPECIFIC DELIVERY UP OF CHATTELS.]—*A bill lies to compel the delivery of an altar-piece, or other curiosity in specie.*

THE Duke of Somerset, as lord of the manor of Corbridge, in Northumberland (part of the estate of the Piercys, late earls of Northumberland), was entitled to an old altar-piece made of silver, remarkable for a Greek inscription, and dedication to Hercules. His Grace became entitled to it as treasure-trove within his said manor.

This altar-piece had been sold by one who had got the possession of it, to the defendant, a goldsmith at Newcastle, but who had notice of the Duke's claim thereto.

The Duke brought in a bill in equity, to compel the delivery of this altar-piece *in specie undefaced.*

The defendant demurred as to part of the bill, for that the plaintiff had his remedy at law, by an action of trover or detinue, and ought not to bring his bill in equity; that it was true for writings savouring of the realty a bill would lie, but not for anything merely personal (*a*) any more than it would lie for a horse or a cow. So a bill might lie for an heir-loom, as in the case of *Pusey* v. *Pusey*, 1 Vern. 273; and, though in trover the plaintiff could have only damages, yet in detinue, the thing itself, if it can be found, is to be recovered; and if such bills as the present were to be allowed, half the actions of trover would be turned into bills in Chancery.

(*a*) *Cudd* v. *Rutter*, 1 P. Wms. 570; ante, p. 848, nom. *Cuddee* v. *Rutter*; *Colt* v. *Netterville*, 2 P. Wms. 304.

On the other side, it was urged, that the thing here sued for, was matter of curiosity and antiquity; and though at law, only the intrinsic value is to be recovered, yet it

would be very hard that one who comes by such a piece of antiquity by wrong, or it may be as a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it: which is like a trespasser's forcing the right owner to part with a curiosity or matter of antiquity, or ornament, nolens volens. Besides, the bill is to prevent the defendant from defacing the altar-piece, which is one way of depreciating it; and the defacing may be with an intention that it may not be known, by taking out or erasing some of the marks and figures of it; and though the answer had denied the defacing of the altar-piece, yet such answer could not help the demurrer: that in itself, nothing can be more reasonable than that the man who by wrong detains my property, should be compelled to restore it to me again *in specie;* and the law being defective in this particular, such defect is properly supplied in equity.

Wherefore it was prayed that the demurrer might be overruled, and it was overruled accordingly [by Lord Chancellor *Talbot*].

Since the decision in the cases of *Pusey* v. *Pusey*, and *The Duke of Somerset* v. *Cookson*, it has always been admitted, as undoubtedly within the jurisdiction of a court of equity, specifically to compel the delivery up of heir-looms, or chattels of *peculiar value* to the owner, although the heir-looms or chattels, if they could be found, might be recovered in an action of detinue, or their value in an action of trover. The ground of the jurisdiction is the same as that upon which the specific performance of an agreement is enforced —viz., that the specific thing is the object, and damages will not afford an adequate compensation.

"The Pusey horn, the patera of the Duke of Somerset, were things of that sort of value that a jury might not give twopence beyond the weight. It was not to be cast to the estimation of people who have not those feelings. In all cases where the object of the suit is not liable to a compensation by damages, it would be strange if the law of this country did not afford any remedy. It would be great injustice if an individual cannot have his property without being liable to the estimate of

people who have not his feelings upon it."—Per Lord *Loughborough*, C., in *Fells* v. *Read*, 3 Ves. 71. In *Saville* v. *Tankred*, 1 Ves. 101, Belt's Suppl. 70, upon a bill being filed by the representative of a Mr. Saville, the pawnee of a strong-box containing jewels, Lord *Hardwicke* ordered it to be delivered up to him, although it was objected that the representative of the Duke of Devonshire, to whom it belonged, ought to have been made a party. "The pawnee of a pledge," observed his Lordship, "as Saville was, may bring trover or detinue at law for it, without troubling himself with the pawner, for he has a special property. But suppose he was not pawnee, but had only the possession of them, and delivered them to another, that person has nothing to do with the Duke. Therefore, let these jewels come into his hands which way they will, he may give the custody of them to any one, and have them back without hurting the Duke or his representative:" and see *Lloyd* v. *Loaring*, 6 Ves. 773; *Pearne* v. *Lisle*, Amb. 77; *Nutbrown* v. *Thornton*, 10 Ves. 163; *Arundell* v. *Phipps*, 10 Ves. 139; *Lowther* v. *Lowther*, 13 Ves. 95; *Falcke* v. *Gray*, 4 Drew. 651. In *Earl of Macclesfield* v. *Davis*, 2 V. & B. 16, where a Bill was filed for the delivery up of an iron chest, containing certain articles said to be heir-looms, Lord *Eldon* said, "It is now too late, since the case of *Fells* v. *Read*, following the case of *Pusey* v. *Pusey*, to discuss whether this Court will interfere for the specific delivery of a chattel; and if it will in such case à fortiori the restitution of heir-looms must be decreed, upon which there never was any doubt."

But a court of equity will not decree the specific delivery up of a chattel where adequate damages can be ascertained and the payment thereof enforced by an action at law. Thus, although the Court has jurisdiction to order the delivery up to an artist of a picture painted by himself as having a special value, the legal remedy being inadequate, nevertheless where by the terms of an agreement and the frame of the pleadings, the plaintiff, an artist seeking restitution of a picture, had in effect put a fixed price upon it, it was held that damages would be an adequate remedy, and that there was no jurisdiction in a court of equity to interfere. *Dowling* v. *Betjemann*, 2 J. & H. 544.

And it seems now that the interposition of courts of equity will not be confined to those cases in which the articles sought are of some peculiar or intrinsic value, if there subsist any fiduciary relation between the parties. Thus, in *Wood* v. *Rowcliffe*, 3 Hare, 304, where a bill had been filed against an agent for the delivery up of furniture and household effects, deposited by the plaintiff with him, and to restrain him from parting with them, as he threatened to do, it was argued for

the defendant, who demurred for want of equity, that household furniture and effects were not chattels of such a peculiar or valuable nature as to be within the rule, and that all the cases in which the specific delivery up of chattels had been decreed were put upon their peculiar and valuable nature, as the horn in *Pusey* v. *Pusey*, the tobacco-box of the club in *Fells* v. *Read*, the patera in *The Duke of Somerset* v. *Cookson*, the box of jewels in *Saville* v. *Tankred*, and the heir-looms in *The Earl of Macclesfield* v. *Davis*, —all being articles of curiosity, antiquity, or hereditary estimation, which, as observed by Lord *Eldon*, in the case of *Nutbrown* v. *Thornton*, turned upon the pretium affectionis; and that the same considerations arose in *Lady Arundell* v. *Phipps*, where the injunction was granted to protect ancient family pictures, chattels, which Lord *Eldon* described as being "of a very special and peculiar kind." Sir *J. Wigram*, V.-C., however, overruled the demurrer. "I have not," observed his Honor, "the slightest doubt that the plaintiff is entitled to the protection of the Court against the wrongful act which is threatened by his agent. I have known many bills to have been filed in the Court of Exchequer formerly, on behalf of the owners of cargoes, to prevent improper dealings with the goods by their agents, or persons in the situation of agents. The right to be protected in the use or beneficial enjoyment of property *in specie* is not confined to articles possessing any peculiar or intrinsic value." Lord *Cottenham*, upon appeal, approved of the law on this subject, as laid down by the Vice-Chancellor. "The cases," observed his Lordship, "which have been referred to, are not the only class of cases in which this Court will entertain a suit for delivery up of specific chattels. For where a fiduciary relation subsists between the parties, whether it be the case of an agent, or a trustee, or a broker, or whether the subject-matter be stock or cargoes, or chattels of whatever description, the Court will interfere to prevent a sale, either by the party intrusted with the goods, or by a person claiming under him, through an alleged abuse of power;" 2 Ph. 383. And see *Lingen* v. *Simpson*, 1 S. & S. 600; *Pooley* v. *Budd*, 14 Beav. 34; *Pollard* v. *Clayton*, 1 K. & J. 462; *Edwards* v. *Clay*, 28 Beav. 145.

Upon the same principle a court of equity will decree a specific delivery up of deeds or writings to the persons legally entitled to them. See *Brown* v. *Brown*, 1 Dick. 62; *Armitage* v. *Wadsworth*, 1 Madd. 192: *Reeves* v. *Reeves*, 9 Mod. 128; *Tanner* v. *Wise*, 3 P. Wms. 296; *Harrison* v. *Southcote*, 1 Atk. 528; *Ford* v. *Peering*, 1 Ves. jun. 72; *Papillon* v. *Voice*, 2

P. Wms. 478; *Duncombe* v. *Mayer*, 8 Ves. 320; *Knye* v. *Moore*, 1 S. & S. 61; *Freeman* v. *Fairlie*, 3 Mer. 30; *Grey* v. *Cockeril*, 2 Atk. 114; *The Duchess of Newcastle* v. *Pelham*, 3 Bro. P. C. 460, Toml. ed.; *Reece* v. *Trye*, 1 De Gex & Sm. 273; *Lady Beresford* v. *Driver*, 14 Beav. 387; 16 Beav. 134; Tudor's L. C. Real Prop. p. 75, 2nd ed., and cases there cited.

In *Jackson* v. *Butler*, 2 Atk. 306, where mortgage deeds, delivered to a person for the purpose of receiving the principal and interest due on the mortgage, and pawned by him, were decreed to be delivered up by the pawnee, Lord *Hardwicke* observing, that the plaintiff might have had an action of trover, but then he could only have damages for the detaining, but not the deeds themselves, and therefore he was right in bringing a bill in equity for the recovery of his deeds.

And it has been held that there is nothing in the character or nature of the certificate of registry of a ship which excludes it from the jurisdiction of the Court to decree its delivery as against a party unlawfully detaining it. *Gibson* v. *Ingo*, 6 Hare, 112.

In a suit to recover specific chattels, as, for instance, deeds, it is not necessary, as in trover, to prove conversion, or resistance to deliver them up when sought to be recovered. This is so at law, but in equity the Court looks at the case made by the defendant; it is not necessary to apply to a defendant before a suit is instituted; but if the defendant says, 'if you had applied to me, I should not have contested your claim,' then, undoubtedly, he gets the costs of it; but if it appears that an application would have been useless, and that the defendant resists at the hearing, the Court looks at the case exactly in the same point of view as if that right had been insisted upon before the bill had been filed." Per Sir *John Romilly*, M. R., in *Turner* v. *Letts*, 20 Beav. 191.

The courts of common law had conferred upon them under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), after judgment in an action of detinue, the same jurisdiction to compel the return of a chattel as the Court of Chancery, but the latter court might enforce its decrees by attachment, whilst the courts of common law could only enforce restitution under the 78th section of the Act, by distringas. Day's Common Law Procedure Acts, p. 274, 3rd ed. But see now Rules of the Supreme Court, Order 44.

As to the measure of damages at common law for the non-delivery of a chattel according to contract, see *Cory* v. *The Thames Iron Works and Ship-Building Company, Limited*, 3 L. R. Q. B. 181.

FLETCHER *v.* ASHBURNER.

June, 1779.

[REPORTED 1 BRO. C. C. 497.]

CONVERSION.]—*Where a real estate is ordered to be sold, it becomes personalty, and shall go accordingly.*

JOHN FLETCHER, by his will devised his burgage houses and free rents in Kendal, and all his personal estate, to trustees and the survivor, and the heirs, executors, and administrators of such survivor, in trust to sell so much as should be sufficient to pay his debts, and then to permit his wife Agnes to enjoy the residue during her life, if she so long continued his chaste widow, and after her decease, to sell and dispose thereof, and the money arising thereby, after deducting charges, and half-a-guinea each to the trustees for their trouble, to pay to and between his son William and daughter Mary, share and share alike; provided, that if his wife should happen to marry again, the trustees should, immediately after the marriage, sell all the estate and effects given to her for her life, and, after such deductions as aforesaid, should pay the remainder of the money to and amongst his wife, his son William, and daughter Mary, share and share alike, equally; and in case either his son William or his daughter Mary should die before his or their legacy should become due, that the share or legacy of him or her so dying should go to the survivor of them.

The testator died, leaving Agnes his widow, William his only son and heir-at-law, and Mary his daughter.

Agnes, by the custom of burgage tenure, was entitled to hold the burgage houses in Kendal during her chaste viduity, against the disposition of her husband by will.

Mary attained twenty-one, but died unmarried, in the

life of her mother and brother. William was twenty-one at the death of the testator, and died without issue, in the life of his mother: the mother died the widow of the testator.

Upon her death a bill was filed by the heir-at-law of William, and John the testator, against the trustees and the personal representatives of the testator and of the widow, to have a conveyance of the real estates devised by the will to the plaintiff, the heir-at-law.

The representative of the widow, who was the sole next of kin of William, the son, by answer claimed the property as personal; alleging, that, by the direction to the trustees to sell the real estates, they became as personal property, and, as such, were to go to the personal representative of William, the son, who survived his sister.

The cause was heard the 11th December, 1778, where the first objection taken was, that the personal representative of William was not before the Court.

But Sir THOMAS SEWELL, M. R., was of opinion there were sufficient parties to sustain the question; that the personal representative was a mere formal party; and that, if he thought proper to make a decree, a personal representative might be brought before the Master.

Mr. *Madocks* and Mr. *Wilson* further argued, with respect to the principal question, that the real estates devised by the will were still to be considered as real estates, and to go to the real, not the personal, representative; that it was clear the intention of the testator that the estate should remain, and, whilst it did so, was to be enjoyed by one person; and he directed it to be sold merely for the purpose of a division; that, in consequence of the death of the daughter no division was to be made, and therefore the reason for the directions ceased; and, from thenceforth, the son alone becoming entitled, upon the death of his mother, it was to be considered as land. They relied upon the case of *Flanagan* v. *Flanagan*, 8th June, 1768, before Lord *Camden*, which was a devise of real and personal estate to trustees in

trust, out of the personal estate, and by sale of a sufficient part of the real, to pay debts; the surplus, after payment of debts, to A. A suit was instituted for payment of the debts, and the real estates decreed to be sold; part was sold: and afterwards A. died, leaving a son and daughter; the cause was revived against the son; and it being apprehended that sufficient was not sold to pay the debts, a further part of the real estate was sold under the order of the Court. It afterwards proved that the money produced by the first sale was sufficient to pay the debts; the question was, whether the heir or the personal representative was entitled to this money. It was alleged by Mr. Wilson, who cited the case, that Lord *Camden's* determination was, that whatever quality the fund then had, such it should retain; and he decreed for the personal representative. The other cases mentioned were *Cruse* v. *Barley and Banson*, 3 P. Wms. 20, and *Digby* v. *Legard*, before Lord *Bathurst* (*a*).

(*a*) 3 P. Wms. 22, note (1).

Mr. *Kenyon* and Mr. *Chambre* (on behalf of the defendants, the executors of the widow) contended that the testator had, by his will, directed the real estate, after the death of his widow, to be sold, and blended with his personal estate, and the whole to be divided between his children, or in case either of them should die in the life of his wife, to the survivor. Upon the case of *Flanagan* v. *Flanagan*, it was observed that the Court determined the produce of the real estate to be considered as personal, because the Court had itself directed the sale to be made and the property to be changed for payment of debts. The cases of *Digby* v. *Legard*, and *Cruse* v. *Barley and Banson*, were treated as inapplicable to the present case, being cases of lapsed devises: *Durour* v. *Motteux*, 1 Ves. 320 (*b*), and *Mallabar* v. *Mallabar*, Cas. t. Talb. 78, were cited, as decisive of the question in favour of the defendants.

(*b*) See will of Motteux correctly stated, 1 S. & S., 292, note (*d*).

Sir Thomas Sewell, M. R., in June, gave his opinion. He observed, that nothing was better established than this principle: that money directed to be employed in the

purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed, or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money or money land. The cases established this rule universally.

If any difficulty has arisen, it has arisen from special circumstances. In the case of *Sweetapple* v. *Bindon*, 2 Vern. 536, it was determined that a husband was entitled to money to be laid out in land, as tenant by the curtesy: and although it is held that a wife is not entitled to dower in a similar case, yet it is allowed that it is so held, because cases have been determined, and not from any principle. The cases of land to be turned into money are fewer than those of money to be employed in the purchase of land. The principal cases have been where real estates have been directed to be sold, and some part of the disposition has failed; so that something has resulted to the heir-at-law, as in the case of *Emblyn* v. *Freeman*, Prec. Ch. 541, and *Cruse* v. *Barley and Banson*, 3 P. Wms. 20. These are all cases where a devise has failed, and the thing devised has not accrued to the representative or devisee, but to the heir-at-law of the testator. The case of *Durour* v. *Motteux*, 1 Ves. 320, is a strong case to the point now before the Court; and, if anything could strengthen the general rule, the circumstances of the present case would do so. The testator has blended the real and personal estate together, and disposed of them without distinction, for the benefit of his wife and children. Both real and personal estate are made one fund. In the case of *Durour* v. *Motteux* (*a*), Lord *Hardwicke* made this a principal ground for considering the whole fund as personal estate; in the present case it might be uncertain, till the death of the widow, whether

(*a*) 1 Ves. 320.

the estates must not be absolutely sold; both the children, indeed, died before her; but she might have married before the death of one or both. The interests of both the children were vested, subject, as to one of them, to be defeated in case either of them died before the mother.

There could be no election to take the fund as land or money; for, where an estate is directed to be sold, and the money divided amongst several persons, none has a right to say that any part shall not be sold (*a*); the question, therefore, is merely between the real and personal representatives of the son, whether the personal representative shall take the fund as personal property, according to the will, or the heir-at-law shall take it, as if no will had been made.

(*a*) See also *Deeth* v. *Hale*, 2 Moll. 317; *Smith* v. *Claxton*, 4 Madd. 493; *Chalmer* v. *Bradley*, 1 J. & W. 59; *Trower* v. *Knightley*, 6 Madd. 134.

The case of *Flanagan* v. *Flanagan* (*b*) is a strong authority that it shall be taken as a personal estate, according to the will. In that case the testatrix, Sarah Wooley, by will, dated 28th March, 1749, gave and devised all her real and personal estates to Francis Plumtree, in trust, in the first place, out of her personal estate, as far as it would extend, and, in the next place, by sale of her real estate, or a sufficient part thereof, to raise so much money as should be sufficient to pay her debts and legacies; and, after payment thereof, in trust to convey the residue of the real estate which should remain unsold, and pay the produce of such part as should be sold, and all other the residue of her real estates, between her father, James Flanagan, and her brother, James Flanagan, their heirs, executors, and administrators, equally. A bill was brought by the creditors for sale of the real estate, to supply the deficiency of the personal estate, for payment of debts, and a decree was made for a sale; and if any of the money to arise by the sale should remain after payment of the debts and legacies, it was directed to be paid to James Flanagan, the father, and James Flanagan, the son, equally; and if any estate should remain unsold, the trustees were directed to convey it to them and their heirs, equally; after the decree, James Flanagan, the son, died

(*b*) See this case cited and explained by Mr. Scott arguendo in *Ackroyd* v. *Smithson*, post. See also *Steed* v. *Preece*, 18 L. R. Eq. 196, where it is approved of by Sir *G. Jessel*, M.R.

leaving a daughter, and a son, born after his death; part of the estate was sold, and afterwards, James Flanagan, the grandfather, died, leaving his grandson his heir, and his grandson and granddaughter his sole next of kin; after the death of the grandfather, a further part of the estate was sold, under an apprehension that the produce of the first sale was insufficient to pay the debts and legacies: it appeared, however, that the produce of the first sale was sufficient. A bill was afterwards brought by the son of James Flanagan, the son, claiming a moiety of the surplus, as the real estate of James Flanagan, his grandfather, to whom he was become heir, against the personal representative of his grandfather, and against the daughter of James Flanagan, the son, who claimed a moiety as one of the next of kin of her grandfather. It was objected, that the second sale, after the death of the grandfather, was improper. The Court determined, that the second sale, actually made under the decree of the Court, before the Master, could not be considered as improperly made; that there was no fraud, no practice, and that the money ought to go to the personal representative of the grandfather. The case of *Digby* v. *Legard* (*a*) is a different question. There the testatrix (Elizabeth Byerley) directed her real estates to be sold to pay debts and legacies, and gave the residue to five persons, to be equally divided between them, one of whom (Lady Cayley) died in her lifetime. It was resolved that the devise, so far, failed totally, and should accrue to the heir-at-law. The language of the decree is such, that the benefit of the devise to Lady Cayley should accrue to the testatrix's heir-at-law, Mr. Jervoice, who was a lunatic, and should be paid to his committee, as real estate descended to him. The case of *Scudamore* v. *Scudamore*, Prec. Ch. 543, shows, that in all cases where the dispute is between representatives, the heir or executor shall have the fund, according to the will or contract of the persons who gave or created it. There was a case of *Ogle* v. *Cook* (*b*), heard 12th February, 1748, which was this: Mr. Ogle made his will in 1744, and gave his real estate to trustees to sell, and to vest the money

(*a*) 3 P. Wms. 22 n.

(*b*) See *Collins* v. *Wakeman*, 2 Ves. jun. 636, where Lord

Loughborough says, that he had caused the Reg. Lib. to be examined, and it was found that the point supposed to have been decided by *Ogle* v. *Cook*, was in reality left undecided.

in stock, and pay the interest to his wife during the widowhood, and after her death, or marriage, to his two daughters equally, except that the eldest was to have 1000*l.* more than the other; he gave the residue of his personal estate in the same way. He afterwards conveyed the real estate to one of the trustees named in his will, to whom he was considerably indebted, in trust to sell so much as should be necessary to pay the debt, and as to the residue, in trust for Mrs. Ogle: part of the estate was sold, and then Mr. Ogle died. His youngest daughter died in his lifetime. The bill was brought by the widow and the eldest daughter, against the son who was the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the youngest daughter, as personal estate of Mr. Ogle, to be divided between them and the son as his next of kin. The son insisted the conveyance to the trustee was a revocation of the will; and, if not, that the share of the dead daughter was to be considered as real estate of Mr. Ogle, and descended to him as heir. It was determined that the conveyance was a revocation only pro tanto, to let in the debt; and that so much of the estate as remained unsold, should be sold, and that the money raised, or to be raised, by sale of the estate, made part of the personal estate of Mr. Ogle. There was another case about the same time, which is in 1 Ves. 174 (*Cunningham* v. *Moody*), where, by marriage articles, 500*l.* was agreed to be laid out in purchase of lands, to be settled to the use of the husband for life, with remainder to trustees to preserve contingent remainders, with remainder to the wife for life, with remainder to the children of the marriage, as the husband and wife should appoint; and in default of a joint appointment, as the survivor should appoint; and in default of any appointment, to the children, to be equally divided among them; if more than one, as tenants in common, in tail general, with cross remainders; and if but one, to that child in tail general; and no appointment was made. The father and mother being dead, and the daughter being married, the trustees paid the 500*l.* to her and her husband, and they received it as money, and

executed a release. The daughter had a child, which died, and she afterwards died without issue. A daughter of the settlor, by a second marriage, filed a bill against the husband, representative of his wife, the daughter by the first marriage, for the 500*l.*, considering it as land; and it was observed, that she was entitled to the money, but that the husband of her deceased sister was entitled to the interest during his life, as tenant by the curtesy.

In the present case, William Fletcher, the son, had the whole beneficial title vested in him as money, subject to his mother's interest for life or widowhood. She was his sole next of kin, and her personal representatives are now entitled to the estate as money: the bill must, therefore, be dismissed without costs.

In the judgment of Sir *Thomas Sewell* in the principal case, the equitable doctrine of constructive conversion is thus accurately stated, viz.: "that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given—whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land:" see *Wheldale* v. *Partridge*, 5 Ves. 396, where this statement of the doctrine is repeated and approved of by Lord *Alvanley*, M. R.

As to the conversion of money into land by contract or will.]—The authorities shew, that money agreed or directed to be laid out in land, becomes land so completely, as to acquire all the properties of land; thus it will be considered as real and not personal assets. Suppose, for instance, A. bequeathed a sum of money to trustees, upon trust to purchase lands, and settle them upon B. and his heirs, or by marriage articles money had been agreed to be laid out in lands for B. and his heirs, on the death of B., without a purchase having been

made, the money will be considered as land: and, therefore, it would not, previously to 3 & 4 Will. 4, c. 104, have been liable to the payment of the debts of B. by simple contract: *Whitwick* v. *Jermin*, cited in *Baden* v. *Earl of Pembroke*, 2 Vern. 58; *Lawrence*, v. *Beverley*, cited ib. 55; *S. C.*, 2 Keb. 841; *Fulham* v. *Jones*, cited *Pulteney* v. *Darlington*, 7 Bro. P. C. 530; *Foone* v. *Blount*, Cowp. 467. But it would be bound as real assets by a judgment: *Frederick* v. *Aynscombe*, 1 Atk. 392. However, since the passing of 3 & 4 Will. 4, c. 104, money directed to be laid out in the purchase of land will be liable, as other *real assets*, to the payment of simple contract debts.

Upon the same principle, money agreed or directed to be converted into land, will be subject to tenancy by the curtesy, thus in *Sweetapple* v. *Bindon*, 2 Vern. 536, where A. bequeathed 300*l.* to be laid out in land, and settled to the use of her daughter and her children, and if her daughter died without issue, to go over, the husband of the daughter was held to be tenant by the curtesy, although no purchase had been made during his wife's lifetime. And see *Cunningham* v. *Moody*, 1 Ves. 174; *Dodson* v. *Hay*, 3 Bro. C. C. 404; *Follett* v. *Tyrer*, 14 Sm. 125; but since, by a singular anomaly, a woman was not entitled to dower out of an equitable estate, she was not dowable out of money directed to be laid out in land: *Cunningham* v. *Moody*, 1 Ves. 176; *Crabtree* v. *Bramble*, 3 Atk. 687; but now, by 3 & 4 Will. 4, c. 105, women married after the 1st of January, 1834, whose dower has not been barred, will be dowable out of equitable estates, and it would seem to follow that they will be dowable out of money to be laid out in lands of inheritance.

Money agreed or directed to be laid out in land, will pass under a general devise of all the lands of the person entitled to it (*Greenhill* v. *Greenhill*, 2 Vern. 679; Prec. Ch. 320; *Guidot* v. *Guidot*, 3 Atk. 256; *Rashleigh* v. *Master*, 1 Ves. jun. 201; *S. C.*, 3 Bro. C. C. 99; *Biddulph* v. *Biddulph*, 12 Ves. 161; *Green* v. *Stephens*, 17 Ves. 77); or by a devise of "all his lands in a particular county, or elsewhere," although it has been argued, that the testator must have alluded to land, and something local: *Lingen* v. *Sowray*, 1 P. Wms. 172.

Although a will not coming within the operation of the late Wills Act (1 Vict. c. 26), would not pass lands agreed to be purchased *after* its execution (*Langford* v. *Pitt*, 2 P. Wms. 629); yet, where money was agreed or directed to be laid out in the purchase of lands, to be settled on the testator and his heirs, even if the money were not laid out in the purchase of lands until after he had made his will, they would in equity pass by it under a general

devise. See *Lingen* v. *Sowray*, 1 Eq. Ca. Ab. 175, pl. 5; but now, lands purchased after the execution of a will may pass by it at law. See 1 Vict. c. 26, s. 24, which enacts, "that every will shall be construed, with reference to the real estate, and personal estate, comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Upon the same principle, money agreed or directed to be laid out in land will not pass as money by a general bequest to a legatee; though it will by a particular description, as so much money to be laid out in land, or "as so much money left me by the will of A." (*Cross* v. *Addenbrook*, cited in the note to *Leckmere* v. *Earl of Carlisle*, 3 P. Wms. 222; *Edwards* v. *The Countess of Warwick*, 2 P. Wms. 171; *Gillies* v. *Longlands*, 4 De G. & Sm. 372); and although previously to the late Wills Act (which enacts, that no will of an infant shall be valid), infants of the age of fourteen years might by will have disposed of their personalty, they could not, by will, have disposed of money directed to be converted into land: *Earlom* v. *Saunders*, Amb. 241.

Money agreed or directed to be laid out in the purchase of land, acquires the descendible properties of land; but with respect to the rights of the heir of the person upon whom money impressed with the character of realty is settled, it is necessary to distinguish between those cases where the heir claims the payment of the money from strangers, and those cases where he claims the payment from the personal representatives of his own ancestor. Where the heir claims payment of the money from strangers, he will, it seems, in all cases be preferred to the personal representatives of his ancestor. Thus, where money has been bequeathed to be invested in land, for the use of the ancestor and his heirs; or where, on the marriage of the ancestor, money has been actually paid, either by him or by a stranger, to trustees, to be laid out in land, to be settled upon himself for his life, remainder to his wife for her life, with remainder to their issue, and in default of issue, to the ancestor and his heirs; or if, on the marriage of the ancestor, there be a covenant on the part of a stranger to lay out money in the purchase of land, to be settled to the same uses, and in all these cases the ancestor die without issue—the heir of the ancestor, and not his personal representatives, will be entitled to the money to be laid out in the purchase of land: *Scudamore* v. *Scudamore*, Prec. Ch. 543; *Disher* v. *Disher*, 1 P. Wms. 204; *Chaplin* v. *Horner*, 1 P. Wms. 487; *Edwards* v. *Countess of Warwick*, 2 P. Wms. 171; *Knights* v. *Atkins*, 3 Vern. 20.

If the heir seeks payment of the money from the personal representatives of the ancestor, his claims will be superior to those of the personal representatives, if there be any prior outstanding interest in the fund in another person. Thus, where the ancestor has covenanted to lay out a sum of money in land, to be settled upon himself for life, remainder to his wife for her life, remainder to the issue of the marriage; if, on the death of the ancestor, the wife or any issue be living, although they may afterwards die, the heir can call upon the personal representatives for the money: *Kettleby* v. *Atwood*, 1 Vern. 298, 471; *Lancy* v. *Fairechild*, 2 Vern. 101; *Chaplin* v. *Horner*, 1 P. Wms. 483; *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 211; Cas. t. Talb. 80; *Oldham* v. *Hughes*, 2 Atk. 452; *Wrightson* v. *Macaulay*, 4 Hare, 487.

If, however, the wife die in the lifetime of the ancestor, leaving no issue of the marriage, then, as the obligation to lay out and the right to call for the money centre in the same person—viz. the ancestor—the covenant, without any act on his part, will be considered as discharged: the money, to use a quaint expression, is "*at home*," and the heir will have no equity against the representatives of his ancestor. Thus, in *Chichester* v. *Bickerstaff*, 2 Vern. 295, it appears that, on the marriage of Sir John Chichester with the daughter of Sir Charles Bickerstaff, Sir Charles, by articles, was to pay 1500*l.* in part of the portion, which, *together with* 1500*l. more*, *to be advanced by Sir John* within three years after the marriage, was to be invested in land, and settled on Sir John for life, his intended wife for life, remainder to their issue, remainder to Sir John's right heirs. Within a year of the marriage the wife died, and Sir John three days after, without issue. Sir John, by his will, made Sir Charles *his executor*, and devised the residue of his personal estate, after debts, &c. paid, to Frances Chichester, his sister. The heir-at-law of Sir John filed a bill against Sir Charles to compel him to pay the 1500*l.* (*i.e.*, the 1500*l.* to be advanced by Sir John), insisting that, by virtue of the marriage articles, the money ought to be looked on and considered in equity as land, and therefore belonged to him as heir. But Lord *Somers* said, "This money, though once bound by the articles, yet when the wife died without issue, became free again, and was under the power and disposal of Sir John, as the land would likewise have been in case a purchase had been made pursuant to the articles, and therefore would have been assets to a creditor, and must have gone to the executor or administrator of Sir John; and this case is much stronger where there is a residuary legatee;" and therefore dis-

missed the bill. Doubts have been thrown upon this case by Sir *Joseph Jekyll*, M. R., in *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 221, and by Lord *Talbot*, in *Lechmere* v. *Lechmere*, Cas. t. Talb. 90; but they seem to have supposed that the plaintiff in this suit sought the 1500*l.* which Sir Charles was to pay, and to have overlooked the fact, that Sir Charles was executor of Sir John, and that the plaintiff must have claimed the 1500*l.* to be advanced by Sir John. In the great case of *Pulteney* v. *Darlington*, 1 Bro. C. C. 238, Lord *Thurlow*, evidently considered that the 1500*l.* to be paid by Sir John was sought by the heir-at-law from the assets in the hands of Sir Charles, *his executor;* for he says, "Where a sum of money is in the hands of one, without any other use but for himself, it will be money, and the heir cannot claim; like the case of *Chichester* v. *Bickerstaff*, against which I think there is no judgment, though there are a number of opinions.—I know no better authority than that case." In the case of *Pulteney* v. *Darlington*, 1 Bro. C. C. 223, money impressed with the qualities of realty had come to the hands of the person (Lord Bath) solely entitled to it under the ultimate limitation in fee; and the person so entitled, without taking any notice of the particular sum, devised all his manors, &c., which he was seised or possessed of, or to which he was in anywise entitled in possession, reversion, or remainder, or which should thereafter be purchased with any trust monies (except certain estates therein mentioned), to his brother H. in fee, and gave him all the residue of his personal estate, and made him executor. His brother H. subsequently, by his will, gave all his estates, by local descriptions, to certain uses therein mentioned, and all his money, securities for money, goods, chattels, and personal estate, not before disposed of, to his executors, for certain trusts mentioned in his will. Lord *Thurlow*, affirming the decree of Lord *Bathurst*, dismissed the bill brought by the heir-at-law to have the money laid out in land. "If," said his Lordship, "A. B. has in his possession 20,000*l.* to be laid out in land for his use, he has nobody to sue; the right and the thing centering in one person, the action is extinguished;" and after citing and commenting upon the cases on this subject, his Lordship added, "The use I make of these cases, notwithstanding the dicta they contain, is this, that where a sum of money is in the hands of one without any other use but for himself, it will be money, and the heir cannot claim. . . . . But whether that is clearly so or not, circumstances of demeanour in the person (even though slight) will be sufficient to decide it: a very little would do; receiving it from the trustees, there is no doubt, would be sufficient. Lord Bath did re-

ceive it; he had it in his hands. Suppose he had it by way of covenant—otherwise, where would there be an end? If he kept it, subject to a covenant to lay it out for fifty years, should the heir come for it at the end of that term? It would lead to infinite inconveniences." This decision was affirmed upon appeal in the House of Lords, 7 Bro. P. C., Toml. ed. 530, and "went," as Lord *Eldon* says, "no further than this, that if the property was *at home*, in the possession of the person under whom they claimed as heir and executor, the heir could not take it; but if it stood out in a third person he might; and the question in that cause was, not upon the equity between the heir and executor, but whether the money was at home:" 8 Ves. 235; *Rich* v. *Whitfield*, 2 L. R. Eq. 583.

It may be here mentioned, that Lord *Rosslyn* in the case of *Walker* v. *Denne*, 2 Ves. jun. 175, 176, observed, that, as between the heir and personal representative, their rights were pure legal rights; that chance decided what should be real, what personal; and that neither had a scintilla of equity to make the property that which it is not in fact. And the same opinion is expressed in *Oxenden* v. *Lord Compton*, 2 Ves. jun. 70; *Lord Compton* v. *Oxenden*, 2 Ves. jun. 265. This doctrine, however, of Lord *Rosslyn's* has been repeatedly dissented from in subsequent decisions. "I am disposed," said Lord *Eldon*, "to say, notwithstanding the opinion of Lord *Rosslyn* in *Walker* v. *Denne*, and some other modern authorities, that if an instrument is to be taken to impress a fund with real qualities immediately upon the execution, in the question between the heir and executor, the money being once clearly impressed with real uses, as land, and one of these uses being for the benefit of the heir, the impression will remain for his benefit; and, to put an end to that impression, it must be shewn either that the money was in the possession of a person who had in himself both the heirs and executors, or he must do some act to denote a change of his intention as to the devolution of the property upon either; and it is not correct to say the Court does not interpose between volunteers, if they give to the executor that money which the instrument has given to the heir:" *Wheldale* v. *Partridge*, 8 Ves. 235. See *Lechmere* v. *Lechmere*, Cas. temp. Talb. 90; and Sir *W. Grant*, M. R., in *Thornton* v. *Hawley*, 10 Ves. 138, also observes, "There is no weight in the circumstance that the property is found in the shape of money or land, for the character is to be found in the deed; and in *Wheldale* v. *Partridge*, the Lord Chancellor lays down, in which I perfectly concur, that it is a circumstance that goes no way, except when the fund gets into

the possession of a party who would have it in either way:" *Kirkman* v. *Miles*, 13 Ves. 338; and see *Stead* v. *Newdigate*, 2 Mer. 521; *In re Pedder's Settlement*, 5 De Gex, Mac. & G. 890.

Money notionally converted into land, will not, however, be considered as converted into land so as to render it liable to succession duty; but it will be liable to the payment of legacy duty. See *Re De Lancey*, 5 L. R. Exch. 102; there the testator, who died in 1800, by his will bequeathed to trustees a fund to be laid out in land, which was to be conveyed to the use of his eldest son for life, remainder to his first and other sons in tail male, remainder to the testator's second son for life, with remainder to his first and other sons in tail male; with remainder to the testator's own right heirs. The testator's two sons died without issue and intestate, and at the death of the survivor, the testator's daughter, his only other child, became entitled to the fund as his heir-at-law, and also as heir-at-law of her two brothers. The fund was never invested, and remained money at the death of the daughter. No act had been done by any one amounting to an election to treat the fund either as money or as land, and a grandson of a brother of the testator received the fund as heir-at-law. It was held by the Court of Exchequer Chamber, affirming the decision of the Court of Exchequer (reported 4 L. R. Ex. 345), that the fund was not liable to succession duty under (16 & 17 Vict. c. 51) s. 30, as being converted into land, but to legacy duty as personalty, and subsequently it was held that duty was payable at the rate of 5*l.* per cent.: see also *The Queen* v. *De Lancey*, 6 L. R. Exch. 286; *S. C.*, 7 L. R. Exch. 140.

It seems that money agreed or directed to be laid out in land, and settled upon a person in fee, will not upon his death without heirs be converted in equity, so that it should escheat to the Crown. "To convert for the Crown," says Lord *Rosslyn*, "is too extraordinary for a court of equity:" *Walker* v. *Denne*, 2 Ves. jun. 170, 185; *Burgess* v. *Wheate*, 1 Eden, 177; *Henchman* v. *Attorney-General*, 3 My. & K. 483, 494.

Where money impressed with the character of realty belonged to a person who was convicted of felony, it would not be forfeited to the Crown, as would have been the case if it were not for the notional conversion: *Re Harrop's Estate*, 3 Drew, 726; and see *In re Wharton*, 5 De G. Mac. & G. 33. But forfeiture for treason or felony is now abolished: 33 & 34 Vict. c. 23, s. 1.

Questions frequently arise as to the mode in which money in court, impressed with the character of realty, can be laid out upon lands settled in the same manner as the

money. The authorities are very contradictory, but the present state of the law appears briefly to be this, that where money which under the provisions of a deed, will, or Private Estate Act is to be invested in the purchase of land (*Brunskill* v. *Caird*, 16 L. R. Eq. 493; *Bostock* v. *Blakeney*, 2 Bro. C. C. 653; *Dunne* v. *Dunne*, 3 Sm. & Giff. 22; *sed vide Lord Hotham's Trusts*, 12 L. R. Eq. 76) as well as money so to be invested by virtue of the Lands Clauses Act (8 Vict. c. 18), or the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120, amended by 39 & 40 Vict. c. 30), it will, in a proper case, be ordered by the Court to be employed in erecting new buildings upon land settled to same uses, on the principle that the erection of buildings is substantially the same thing as the purchase of a new estate: see *Drake* v. *Trefusis*, 10 L. R. Ch. App. 364; *In re Wight's Devised Estate*, 6 W. R. (V.-C. W.) 718; *In re Davis' Estate*, 3 De G. & J. 144; *Re Dummer's Will*, 2 De G. Jo. & S. 515; *In re Leigh's Estate*, 6 L. R. Ch. App. 887; see also *In re Newman's Settled Estates*, 9 L. R. Ch. App. 681. But the Court will never sanction such money being laid out in repairs, or in permanent improvements not placing new buildings on the land. See *In re Nether Stowey Vicarage*, 17 L. R. Eq. 156; *Drake* v. *Trefusis*, 10 L. R. Ch. App. 364; and see *In re Venour's Settled Estates*, 2 Ch. D. 522, where the Court refused to order money to be laid out in making roads and sewers on building land part of a settled estate, though such money was directed to be laid out in the purchase of land to be settled to the same uses: *In re Speer's Trusts*, 3 Ch. D. 262. Money, however, paid into Court from the sale of glebe land has been allowed to be expended in rebuilding parsonages: see *In re Incumbent of Whitfield*, 1 J. & H. 610; *Ex parte Rector of Shipton*, 19 W. R. (L. C.) 549; *Ex parte Rector of Welbourn*, 17 L. R. Eq. 157, cited; but doubt has been thrown upon these cases in *In re Nether Stowey Vicarage*, 17 L. R. Eq. 156; and in *Williams* v. *Aylesbury and Buckingham Railway Co.*, 9 L. R. Ch. App. 684, the Court refused to recoup a rector for rebuilding a rectory, although that has been done in *Ex parte Rector of Shipton-under-Wychwood*, 19 W. R. (L. C.) 549; and see *Ex parte Rector of Garsington*, 1 Ch. D. 478. *Sed vide In re Davis' Estate*, 3 De G. & J. 144; *In re Buckinghamshire Railway Co.*, 14 Jur. 1065; *Ex parte Rector of Claypole*, 16 L. R. Eq. 574; *In re Louth and East Coast Railway Company*, 2 Ch. D. 225.

As to the conversion of land into money.—Upon the same principle that money agreed or directed to be laid out in land will be considered

in equity as land, so land agreed or directed to be sold will be considered as money, and as such will not pass under a devise of land (*Elliott* v. *Fisher*, 12 Sim. 505); but will pass under a general residuary bequest of personal estate by the *cestui que* trust (*Stead* v. *Newdigate*, 2 Mer. 521; *Farrar* v. *Earl of Winterton*, 5 Beav. 1; *Midland Counties Railway Company* v. *Oswin*, 1 Coll. 74; *Gover* v. *Davis*, 29 Beav. 222; and see *Savile* v. *Kinnard*, 11 Jur. (N. S.) 195, 13 W. R. (V. C. K.) 308); and in case of intestacy, will go to his personal representatives (Gilb. Lex Prætoria, 243; *Ashby* v. *Palmer*, 1 Mer. 296; *Burton* v. *Hodsoll*, 2 Sim. 24; *Biggs* v. *Andrews*, 5 Sim. 24; *Elliott* v. *Fisher*, 12 Sim. [illegible]; *Griffith* v. *Ricketts*, 7 Hare, [illegible]; *Hardey* v. *Hawkshaw*, 12 [illegible] 552); even where conver[illegible] is not to take place until after [illegible] death, *Clarke* v. *Franklin*, 4 K. & J. 257) and they may maintain a bill, in the case of a contract to sell by a vendor, against his heir-at-law and the purchaser for specific performance: *Hoddel* v. *Pugh*, 33 Beav. 459.

A mere notice to treat given by a railway company, or other persons having compulsory powers to purchase lands (to an owner of land in [illegible] ng sui juris), although it may so far constitute an obligation as to enable the company to restrain the landowner from putting up the property for sale by auction (*The Metropolitan Railway Company* v. *Woodhouse*, 11 Jur. (N. S.) 296; 13 W. R. V. C. S. 516), will not operate as a conversion of the land into personalty (*Haynes* v. *Haynes*, 1 Dr. & Sim. 426; *sed vide Walker* v. *The Eastern Counties Railway Company*, 6 Hare, 594), although the landowner state the price he is willing to accept, if he die before the acceptance of his offer; *Re Battersea Park Acts*, *Ex parte Arnold*, 32 Beav. 591; 2 N. R. 257; *Richmond* v. *North London Railway Company*, 5 L. R. Eq. 352, 358. Nor will conversion take place where the contract with the landowner merely fixes the price per acre, without mentioning the quantity to be taken, and the purchase-money paid for the land taken after the owner's death will be realty: *Ex parte Walker*, Drew. 508.

It is clear, moreover, from the cases, that the notice given by the railway company to the landowner cannot operate for an indefinite time; it must be acted upon within a reasonable time, or it must be deemed to be abandoned: *Richmond* v. *North London Railway Co.*, 5 L. R. Eq. 358, 3 L. R. Ch. App. 679. As to abandonment, see *Hedges* v. *Metropolitan Railway Company*, 28 Beav. 109; *Ystalyfera Iron Co.* v. *Neath and Brecon Railway Co.*, 17 L. R. Eq. 142.

But where a notice to take lands by a company under their

compulsory powers is followed up by the company and landowner fixing upon the price, the contract is complete, and conversion will take place. Thus, in *Ex parte Hawkins*, 13 Sim. 569, the Common Council of London being empowered by a local Act of Parliament to take a freehold house belonging to A., for the purposes of the act, at the expiration of six months after notice given of their intention to take the same, served A. with the required notice in September, 1840. *The amount of the purchase money was afterwards agreed* upon, and an abstract of A.'s title was sent to the Common Council. In April, 1841, A. died, having by his will, dated in 1837, devised his real estate to B., and his residuary personal estate to C. Upon a petition being presented by the executors of the residuary legatee for the payment to them of the purchase-money, which after A.'s death, had been paid into court under the act, it was contended by the devisee, that, as the notice given by the Common Council of their intention to take the premises did not amount to a binding contract within the Statute of Frauds, the purchase-money retained the character of realty. However, Sir *L. Shadwell*, V.-C., held, that it was part of the testator's personal estate, and that, subject to his debts, it belonged to his residuary legatee. "Although," said his Honor, "there was no binding contract within the Statute of Frauds, I think that there was that which was tantamount to it; for the act made it lawful for the Common Council to take and use any tenements and hereditaments which they might deem it necessary or expedient to take, use, or pull down and remove for the purposes of the act, at the expiration of six months after notice in writing of their intention to take or use the same, given to the owners or the occupiers thereof. The effect of that provision was to give to the Common Council a parliamentary power to contract for the tenements required for the purposes of the Act; and under the same provision, they had power to enter upon the tenements at law: a much stronger power than could have been given by any private contract between them and the owners of the tenements." And see *The Regent's Canal Company* v. *Ware*, 23 Beav. 575; *Nash* v. *The Worcester Improvement Commissioners*, 1 Jur. (N. S.) 973.

The result is the same where the price is ascertained either by arbitration (*Harding* v. *Metropolitan Railway Co.*, 7 L. R. Ch. App. 154), by the valuation of two surveyors (*Watts* v. *Watts*, 17 L. R. Eq. 217), or the verdict of a jury: *Haynes* v. *Haynes*, 1 Drew. & Sm. 426.

Where the owner in fee of an estate having devised it to an infant, agreed with a Railway Company under their compulsory

powers to sell a portion of it to the Company, and afterwards died before the completion of the purchase, without having altered his will, it was held by Sir *J. Romilly*, M. R., that the executors of the landowner, and not the devisee, were entitled to the purchase-money, and to the compensation for severance, and that the Railway Company was bound to pay the costs of the infant devisee (*In re The Manchester and Southport Railway Company*, 19 Beav. 365). The infant devisee, moreover, is a trustee within the meaning of the Trustee Act, 1850-1, and a vesting order may be made on a petition under that Act: *In re Lowry's Will*, 15 L. R. Eq. 78.

Where the donee of a power agrees to sell land to a Railway Company, and dies before the execution of the power, a Court of equity will supply the defect in the execution of the power, and the personal representative of the donee will be entitled to the purchase-money as personal estate. See *In re Dykes' Estate*, 7 L. R. Eq. 337; there under a settlement, certain lands stood limited to such uses as Dykes should by deed appoint, and subject thereto to the use of Dykes and the heirs of his body, with remainders over. Dykes was also entitled in fee to certain other lands. A Railway Company required part, both of the settled estate and of the lands to which Dykes was absolutely entitled. By an agreement, not under seal, made between Dykes and two of the directors of the Company, after reciting that Dykes was owner of certain lands, part of which, being those specified in the schedule thereto, were required by the Company, and that the purchase-money and compensation to be paid to Dykes, in respect of the taking of such lands had not been ascertained and that it had been agreed to refer these matters to arbitrators and an umpire therein named, the parties thereto bound themselves to abide by the determination of the arbitrators and umpire. The schedule comprised the lands required by the Company, without any distinction as to the titles under which they were respectively held, and a single sum was awarded to Dykes as the purchase-monies for the whole thereof. Before any conveyance was executed Dykes died. It was held by Lord *Romilly*, M. R., that the agreement operated in equity, as an execution of the power of appointment in the settlement, and that the purchase-money was payable to the legal personal representative of Dykes, as part of his personal estate. "The principle," said his Lordship, "upon which a Court of equity proceeds is, that when a person enters into a contract for the execution of a power of appointment for valuable consideration, but does not carry it into

effect and exercise the power, the Court will supply the defect. It is said that here the vendor has not entered into such a contract, but I think that is saying too much. The testator entered into a contract to do that which, if done, would be a good execution of the power. He contracted to sell at a price to be found by arbitration; the price has been found; and that constitutes a good contract, which could be enforced against him and his heirs and devisees. If he had carried this contract into effect, and executed a deed, there would have been a good execution of the power, and I am therefore of opinion, that this is a case bound by the general rules of equity, with respect to the defective execution of powers."

In the absence of special clauses for that purpose, the effect of a railway act is not to alter the devolution of property without the consent of the owner, and therefore, if a company, by virtue of their act, contract with an incapacitated person, as a lunatic, the purchase money is to be considered as real and not as personal estate: *Midland Counties Railway Company* v. *Oswin*, 1 Coll. 74, 80; *In re Sloper*, 22 Beav. 198, cited.

Formerly when a person who had entered into a contract for the purchase of land in fee died before the contract was completed, his devisee as well as his heir-at-law was entitled to have the purchase-money paid out of the personal estate; but he was bound to show that there was a binding contract at the death of the purchaser, and one which could be enforced against an unwilling purchaser: *Garnett* v. *Acton*, 28 Beav. 333; and see *Langford* v. *Pitt*, 2 P. Wms. 629, 632; *Broome* v. *Monck*, 10 Ves. 597, 612, 615.

Where, moreover, the purchaser at the time of his death was under a contract to purchase realty, which might then have been specifically enforced against him, the right of his real representative was not affected by anything which took place subsequently. Thus, if the contract ceased to be binding on the purchaser's representatives in consequence of the felling of ornamental timber by the vendor (Dart V. & P. 265, 5th ed.), or was rescinded by the vendor on the ground of delay (*Whittaker* v. *Whittaker*, 4 Bro. C. C. 31), or under a power reserved to him in the contract (*Hudson* v. *Cook*, 13 L. R. Eq. 417), the real representative of the purchaser was entitled to receive the purchase-money out of his personal estate. See also *Curre* v. *Bowyer*, 5 Beav. 6, n.; *Ayles* v. *Cox*, 16 Beav. 23.

Where an heir-at-law adopted a parol contract of his ancestor to sell land, it was considered to have been converted, and the proceeds to belong to the personal representatives of the

ancestor. See *Frayne* v. *Taylor*, 33 L. J. Ch. (N. S.) 228. There A. B. entered into a verbal agreement to sell certain real estate, but died intestate as to his real estate before the agreement was carried into effect. His heir-at-law took out letters of administration, and, upon the request of the purchaser, executed a conveyance of the estate, which recited the parol contract and the desire of the purchaser to have it completed, and the consent of the heir to do so. Upon passing the residuary accounts of A. B.'s estate, the heir, as administrator, gave credit for the sale-monies as "produce of property contracted to be sold in A. B.'s lifetime, and purchase completed after his death." The heir subsequently claimed the proceeds of the sale as arising from property coming to him as heir-at-law. It was however held by Sir *R. T. Kindersley*, V. C., that although the heir might have repudiated the verbal agreement, and claimed the lands as heir, and sold them himself in that character, yet, as he had in fact adopted and carried out the agreement of A. B., the land must be considered as retrospectively well converted into personal estate, and that the proceeds of the sale belonged to the next of kin. "It is true," said his Honor, "the testator or the purchaser might have said, 'The Statute of Frauds prevents you from compelling me to perform,' but the statute does not make the agreement void. The statute says, no suit shall lie to compel him to carry into effect a verbal agreement. It appears to me what the defendant has done is with design, and not by mistake, but knowing what he was about; he chose to say, 'I will carry out the contract of the testator,' and he did so."

It seems that if the heir-at-law in such a case had acted under a mistake, the Court would have allowed the matter to be rectified. *Ib.* p. 232.

So where a person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished, it was held by Lord *Romilly*, M. R., that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate: *Cooper* v. *Jarman*, 3 L. R. Eq. 98.

It must, however, be remembered, that under 30 & 31 Vict. c. 69, amending Locke King's Act (17 & 18 Vict. c. 113) the *devisee* of a purchaser has lost his right to compel the personal representatives to discharge the unpaid purchase-money (see *ante*, pp. 330, 668), but the right of the *heir-at-law* to do so still remains intact; *Harding* v. *Harding*, 13 L. R. Eq. 493: but will probably be taken away by a Bill of the Lord Chancellor now before Parliament.

A share, however, of the proceeds to arise from a sale of lands

under trusts for conversion is not an interest in land within the meaning of Locke King's Act; a person, therefore, to whom such share has been bequeathed by a testator who had mortgaged it, can demand the payment of the mortgage out of the general personal estate. *Lewis* v. *Lewis*, 13 L. R. Eq. 218.

A contract by a trustee for sale, for the purchase of the trust property, as it cannot be enforced in equity, will not be considered, as between the real and personal representatives of the purchaser, as a conversion of the purchase-money into realty. Thus, in *Ingle* v. *Richards*, 28 Beav. 361, a trustee for sale bought the trust estate at an auction, and died. It was held by Sir *John Romilly*, M. R., that his heir-at-law had no right, as against his next of kin, to have the contract completed for his benefit. "I am clear," said his Honor, "that a mere contract between a trustee for sale and himself, as purchaser, to sell with one hand, and to buy with the other, is not a sufficient contract, which can be specifically enforced at the instance of the heir-at-law, for the purpose of converting his personal estate into real estate, and thus altering the mode of descent." See further on this subject, Dart, V. & P. 261, 262, 265, 266, 267, 5th ed.

Upon the principle of the notional conversion of land into money — an alien, although he could not, previously to the Naturalization Act, 1870 (33 Vict. c. 14) hold land as against the Crown, would, nevertheless, be entitled to the proceeds arising from the sale of land devised to trustees to sell for his benefit: *Du Hourmelin* v. *Sheldon*, 1 Beav. 79, affirmed on appeal by Lord *Cottenham*, 4 My. & Cr. 525. Where, however, there was no trust for absolute conversion, and the heir was an alien, the Crown was entitled to the estate: *Fourdrin* v. *Gowdey*, 3 My. & K. 383. But now, by the Naturalization Act, 1870, which is not retrospective, aliens may hold or dispose of property of every description like British-born subjects: *Sharp* v. *St. Saveur*, 7 L. R. Ch. App. 343.

Where land is devised to trustees upon trust to convert into money for purposes, which either fail or never take effect, and the testator dies without heirs, the lord cannot claim by escheat, as there are tenants in possession, nor has the Crown any right to come into equity to ask that the land should be converted, in order that it might take the money as *bona vacantia*, nor even if the land has been unnecessarily converted, can the Crown make good any claim, as the money will be the absolute property of the trustees: *Taylor* v. *Haygarth*, 14 Sim. 8; *Walker* v. *Denne*, 2 Ves. jun. 185; *Cradock* v. *Owen*, 2 Sm. & G. 241.

The Court will execute a trust of lands for an alien (created prior

to the Naturalization Act, 1870), in favour of the Crown: *Barrow* v. *Wadkin*, 24 Beav. 1; *Sharp* v. *St. Sauveur*, 7 L. R. Ch. App. 343, overruling *Rittson* v. *Stordy*, 3 Sm. & Giff. 230.

Formerly, when a felon was entitled to money arising from the conversion of land, and a sale took place before he worked out his punishment, the Crown became entitled thereto (*Re Thompson's Trusts*, 22 Beav. 506). *Secus*, where he had worked out his punishment before the time of sale, and as the Crown had no equity to compel conversion, *Ib.* But by a recent Act (33 & 34 Vict. c. 23) forfeiture for felony has been abolished, s. 1, and the convict's property will be vested in administrators for the purposes mentioned in the Act. Sect. 10.

A bequest of money to arise from the sale of real estate, or a legacy from a fund to be produced by such a sale, is within the Mortmain Act (9 Geo. 2, c. 36); not because it comes within its express words, but because it comes within its meaning, inasmuch as if such a bequest were allowed, the charity to whom the bequest was made might elect to take the land: *Attorney-General* v. *Lord Weymouth*, Amb. 20; *Paice* v. *The Archbishop of Canterbury*, 14 Ves. 364; *Attorney-General* v. *Harley*, 5 Madd. 321; *Waite* v. *Webb*, 6 Madd. 71; *Thornber* v. *Wilson*, 3 Drew. 245, 4 Drew. 350; *The Incorporated Church Building Society* v. *Coles*, 5 De G. Mac. & G. 331; *Robinson* v. *Robinson*, 19 Beav. 201.

And even when land has been directed to be converted into money by a former instrument, a bequest of the whole or part of the proceeds thereof by a party entitled thereto will be void under the Mortmain Act. See *Attorney-General* v. *Harley*, 5 Madd. 321; *Brook* v. *Badley*, 4 L. R. Eq. 106, 3 L. R. Ch. App. 672; *Lucas* v. *Jones*, 4 L. R. Eq. 73, overruling *Middleton* v. *Spicer*, 1 Bro. C. C. 20; *Shadbolt* v. *Thornton*, 17 Sim. 49, more fully reported 13 Jur. 597; *Marsh* v. *Attorney-General*, 2 J. & H. 61. See Tudor's Charitable Trusts, pp. 69-74, 2nd ed.

The doctrine of equitable conversion is not sufficient to give a court of probate jurisdiction over a will limited to real property. See *In the Goods of Jane Barden*, 1 L. R. (P. & D.) 325. There it was held by Lord *Penzance* that a will limited to the disposition of real property only was not entitled to probate, although it contained the appointment of an executor, and the real estate was given to such executor, with directions to convert the same into personal estate. But see *In the Goods of Jordan*, *ib.* 555.

Conversion must be imperative.] —The direction to convert either money into land or land into money must be express and im-

perative; for if conversion be merely optional, the property will be considered as real or personal, according to the actual condition in which it is found. Thus, in *Curling* v. *May*, cited 3 Atk. 255, A. gave 500*l.* to B., in trust that B. should lay out the same upon *a purchase of lands, or put the same out on good securities*, for the separate use of his daughter H. (the plaintiff's then wife), her heirs, executors, and administrators, and died in 1729. In 1731, H., the daughter, died without issue, before the money was invested in a purchase. The husband, as administrator, brought a bill for the money against the heir of H., and the money was decreed to the administrator; for, the wife not having signified any intention of a preference, the Court would take it as it was found: if the wife had signified any intention, it should have been observed, but it was not reasonable at that time to give either her heir or administrator, or the trustee, liberty to elect; for Lord *Talbot* said, it was originally personal estate, and yet remained so, and nothing could be collected from the will, as to what was the testator's principal intention. See also *In re Ibbitson's Estate*, 7 L. R. Eq. 226.

So, likewise, if money is directed to be laid out "in government or other securities, or in the purchase of freeholds," or "to remain at interest, or be laid out in land," or "to be laid out in freeholds or leaseholds;" or if similar expressions are made use of, leaving the nature of the investment optional, or which do not sufficiently indicate an intention that the money should be laid out in land at all events, no conversion will take place until the trustees have actually exercised their discretion, which, when clearly given to them, the Court will not control. See *Van* v. *Barnett*, 19 Ves. 102; *Amler* v. *Amler*, 3 Ves. 583; *Walker* v. *Denne*, 2 Ves. jun. 170; *Wheldale* v. *Partridge*, 5 Ves. 388; *S. C.*, 8 Ves. 227; *Polley* v. *Seymour*, 2 Y. & C. Exch. Ca. 708; *Smithwick* v. *Smithwick*, 12 Ir. Ch. Rep. 181; *Atwell* v. *Atwell*, 13 L. R. Eq. 23. *In re Whitty's Trust*, 9 I. R. Eq. 41.

In *Bourne* v. *Bourne*, 2 Hare, 35, real estate was conveyed to a trustee, on trust to permit a mortgagor to receive the rents and profits, and upon payment of the principal and interest of the mortgage debt as therein mentioned, to reconvey the estate to the mortgagor, his heirs and assigns; but if default should be made in such payment, then that the trustee should enter into possession of the premises, and *at his discretion*, sell the same, and pay over the residue or surplus (after payment of the debt, interest, and costs) to the mortgagor, *his heirs, executors, administrators, or assigns*. There was default in payment, but no sale of the estate took place until after the death of the mortgagor,

who devised it to the plaintiffs for life, with remainder over in tail. Sir *James Wigram*, V.-C., held, that there was no conversion, but that the surplus proceeds passed by the devise as real estate. "If," said his Honor, "the trustee had taken the property, with absolute directions to sell and convert it, the circumstance, that the directions had not been carried into effect at the death of the testator, might have been immaterial, and it might have been treated as personalty. But in this case, there was no absolute or compulsory direction for the sale or conversion of the estate; it is merely an authority, in a certain event, to enter into possession of this estate, and at the discretion of the trustee to sell it, for the purpose of recovering payment of the debt for the mortgagee. The direction to reconvey the estate, in case of payment of the mortgage-money, is inconsistent with the notion that there was any intention that the property should be absolutely converted by the effect of the conveyance. The event upon the happening of which the trustee might at his discretion have sold the estate—namely, the default in payment of the mortgage money—took place in the lifetime of the testator; but the discretion to sell had not been exercised at the time of his death. The consequence is, that the estate passed to his devisees as realty, subject to the mortgage, and the trustee must therefore account to the devisees for the surplus proceeds of the sale."

And where trustees have a mere power with the consent of a person in possession of certain settled estates to lay out personal property in land to be settled to the same uses, no absolute conversion takes place. *De Beauvoir* v. *De Beauvoir*, 3 H. L. Cas. 524; *Lucas* v. *Brandreth*, 28 Beav. 273; *Edwards* v. *Tuck*, 23 Beav. 268.

So, where money was to be laid out in the purchase of lands in fee simple, *or* for a long term of years absolute or determinable on lives, or of copyhold or customary lands, "with the joint approbation and consent of the husband and wife, and not without," and no approbation or consent was given by them, the money was considered as unconverted, and to remain as personal estate: *Davies* v. *Goodhew*, 6 Sim. 585. *In re Whitty's Trust*, 9 I. R. Eq. 41.

But although conversion is apparently optional, as where trustees are directed to lay out personalty, "either in the purchase of lands of inheritance, or at interest," or "in land or some other securities," as they shall think most fit and proper; yet if *the limitations are adapted only to real estates*, so as to manifest the testator's intention that land shall be ultimately purchased, the money must be considered as land,

although it be not actually so invested by trustees: *Cowley* v. *Hartstonge*, 1 Dow, 361; *Cookson* v. *Reay*, 5 Beav. 22, 12 C. & F. 120; *Johnson* v. *Arnold*, 1 Ves. 169. See also Sugd. Prop. 462.

In *Earlom* v. *Saunders*, Amb. 241, W. P. devised lands to trustees and their heirs, to the use of his wife for life, remainder to his first and other sons in tail, remainder to Widdrington Powell and William Powell, in fee, as tenants in common. And he directed, that 400*l.* should be raised by his executrix out of his personal estate, and paid by her to his trustees, or one of them, who should lay out the same *in a purchase of lands, or any other security or securities, as they should think proper and convenient;* and he directed that the lands so to be purchased, and the security or securities on which the 400*l.* should be so laid out, should be made to, and settled on, the trustees, their heirs and assigns, in trust and to the use of his wife for life, and after her decease, to such uses, and under such provisions, conditions, and limitations, as his lands before devised were limited. Lord *Hardwicke* held, that conversion was not at the election of the trustees. "This Court," said his Lordship, "never admits trustees to have such election, to change the right, unless it is expressly given to them. Here the money is to be laid out in land or securities, for such uses as the land is before settled. If it is laid out in securities (which are personal), all the limitations might not take place; for if there was a son born, he would take the whole money, as being tenant in tail, and the subsequent limitations would be defeated. The only way to make the clause consistent is, that the money be laid out on securities till lands are purchased, and the interest and dividends, in the meantime, to go to such persons as would be entitled to the land." See also *Edwards* v. *Countess of Warwick*, 2 P. Wms. 171; sed vide *Atwell* v. *Atwell*, 13 L. R. Eq. 23.

Where conversion is to take place at the request of certain persons, if the words of request are merely inserted for the purpose of enforcing the obligation to convert, although a conversion has taken place without consent, it will be considered to have been properly made. Thus, where the limitations are *only adapted to real estate*, a direction to lay out money *after the request* of persons, in the purchase of lands, will be construed as imperative, although no request may have been made, and there is a declaration, that *until* the purchase should be made, the money should be placed out on securities, and a disposition of the dividends and interest in the meantime, to the same persons to whom the rents and profits of the

estates to be purchased would go. See *Thornton* v. *Hawley*, 10 Ves. 129, where Sir *W. Grant*, M. R., observes, in reference to the force of the words "after request:" "Nothing is more common than to direct money to be laid out upon request. The object of that is, only to insure that the act shall be done when the request is made —not to prevent it until request." See also the judgment of *Hutchins*, Lord Commissioner, in *Symons* v. *Rutter*, 2 Vern. 227, approved of by Lord *Thurlow*, in *Pulteney* v. *Darlington*, 1 Bro. C. C. 238, and in *Lechmere* v. *The Earl of Carlisle*, 3 P. Wms. 219. Sir *J. Jekyll*, M. R., in reference to *Symons* v. *Rutter*, says, "In this last case, I observe, it was admitted, that if there had not been the clause in the articles, that the purchase should be made with the consent of the husband and wife, it must have been taken as land. Now such clause makes no manner of difference; for upon a convenient purchase being proposed, the Court would have taken on themselves to judge thereof, and, without some reasonable objection made, would have ordered the money to be laid out in it; so that such clause seems to have been immaterial in the marriage articles, and as if omitted, and the opinion of *Hutchins* to have been well grounded:" see also *Costello* v. *O'Rorke*, 3 I. R. Eq. 172; *Wrightson* v. *Macaulay*, 4 Hare, 487; *Batteste* v. *Maunsell*, 10 I. R. Eq. 97, 314; sed vide *Stead* v. *Newdigate*, 2 Mer. 530.

Where, however, words requiring the request or consent of parties to a sale are inserted for the purpose of giving a discretion to them, if the sale takes place without their request or consent, the proceeds of the sale will still be considered as land. Thus in *Davies* v. *Goodhew*, 6 Sim. 585, the sale was to be "with the joint consent and approbation of the husband and wife, and *not without*;" conversion, therefore, in that case, was held to be not imperative, but at the option of the husband and wife. See also *In re Taylor's Settlement*, 9 Hare, 596; *Sykes* v. *Sheard*, 33 Beav. 114.

Where there was a mere discretionary power to convert real property into personalty, and to distribute it amongst a class, and the trustees died after having made only a partial conversion, the discretionary power having been extinguished by their deaths, it was held, that the class, or their representatives, must take the respective estates as they found them: *Walter* v. *Maunde*, 19 Ves. 424; *Rich* v. *Whitfield*, 2 L. R. Eq. 583. And see *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 441.

The result will be different where the power is imperative, and in the nature of a trust. Thus, in *Grieveson* v. *Kirsopp*, 2 Keen, 653, where a testator gave to his wi-

dow, "for the benefit and advantage of his children," power of selling his W. estate, and by a codicil, he expressed himself in effect thus: "I do empower my wife to sell all my estates whatsoever, and the money arising from such sale, together with my personal estate, she my said wife shall and may divide and proportion among my said children, as she shall think fit and proper, or as she shall direct by will." The widow died without having sold or appointed the estate. It was held, by Lord *Langdale*, M. R., that the power was in the nature of a trust for the children, and that, subject to such appointment as the widow might have made, the children were entitled in equal shares; and that the direction to sell, expressed as it was, operated as a conversion of the real estate, and that the children were entitled to take the money to arise from the sale as personalty. See also *Burrell* v. *Baskerfield*, 11 Beav. 525.

The conversion of land into money may be implied without any express words directing a sale. (See *Mower* v. *Orr*, 7 Hare, 475.) But in order to effect such conversion the intention must be clear. *Cornick* v. *Pearce*, *Ib.* 477; see also *Greenway* v. *Greenway*, 1 Giff. 131.

Under the General Stamp Act (55 Geo. 3, c. 184, Sched. part 3), "money to arise from the sale, mortgage, or other disposition, of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of," is liable to the payment of legacy duty. The question often, then, arises, whether the direction for conversion is absolute and imperative, or merely optional; for in the former case, the real estate is liable to the payment of legacy duty, even though it be not sold, in consequence of the person absolutely entitled, electing to take it, instead of the proceeds to arise from a sale (*Attorney-General* v. *Holford*, 1 Price, 426; *Advocate-General* v. *Ramsay's Trustees*, 2 Cr. M. & R. 224, n.; *Williamson* v. *The Advocate-General*, 10 C. & F. 1); while in the latter case, if the trustees, in the exercise of their discretion, leave the land unsold, the legacy duty will not attach: though it has been held, that it will if the trustees, in the exercise of such discretion, sell: *Attorney-General* v. *Mangles*, 5 M. & W. 120; and see *Attorney-General* v. *Simcox*, 1 Exch. Rep. 749. However, notwithstanding those cases, it seems doubtful whether the liability to the duty should depend upon any act of the trustees: *In re Evans*, 2 Cr. M. & R. 206; and see cases cited, 10 C. & F. 14; and *The Advocate-General* v. *Smith*, 1 Macq. H. L. Cas. 76. Now see the 16 & 17 Vict. c. 51 (The Succession Duty Act), s. 29.

Although there is a power to sell, and a sale takes place, if it is

effected, not under the power, but under the jurisdiction of the Court of Chancery, legacy duty will not be payable. Thus when a will empowered trustees, with the consent of A., to sell real estate, and to invest a sufficient sum to answer to annuities; the rents being deficient to pay the annuities, the Court ordered a sale, and out of the produce, 20,000*l.* consols were purchased to provide for the annuities. Legacy duty being claimed, on the corpus of the consols, it was held by Sir *J. Romilly*, M. R., that the validity of the claim depended on the determination of the question, whether the sale had taken place under the general jurisdiction of the Court, or under the power in the will, and his Honor being of opinion that it took place under the jurisdiction of the Court, that no legacy duty was payable. *Hobson* v. *Neale*, 17 Beav. 178.

And where trustees having a power of sale are directed to invest the proceeds "in the purchase or on mortgage" of other lands (*Mules* v. *Jennings*, 8 Exch. 830), and à fortiori, where they are simply directed to invest the proceeds in the purchase of real estate (*Heal* v. *Knight*, 8 Exch. 839, n.), the legacy duty will not attach, although a sale may have taken place, and the person beneficially entitled has elected to take the money in preference to its being invested in the purchase of land. "The Crown," observed *Alderson*, B., "has no claim except where the money is handed over to a party *by force of the will of the testator*, not where the money is handed over under an arrangement in which the will of the devisee and the testator co-operate." *Mules* v. *Jennings*, 8 Exch. 830.

It is clear that the proceeds of real estate which a testator by his will directs to be sold and distributed as personalty will not be liable to probate duty upon the death of the testator. Hanson on Prob. Leg. and Succ. Duty Acts, p. 147, 3rd ed. And it is the same where the direction to sell is contained, not in a will, but in a previous deed, if the direction is capable of being revoked or varied, and is not in fact carried into execution until after the owner's death. Thus, in *Matson* v. *Swift*, 8 Beav. 368, J. Swift conveyed fee simple estates to trustees upon trust by mortgage, sale, lease, or other disposition of the estates to pay certain debts, and the residue to himself, *his executors, administrators, and assigns, and that without any claim or equity thereon, by or in favour of his heir or real representatives*, notwithstanding the estates, or any part thereof, might remain unconverted at the time of his death. J. Swift died leaving a will. The estate was sold after his death. It was held by Lord *Langdale*, M. R., that no part of the produce was liable to probate

duty. "In the present case," said his Lordship, "an actual conversion was required, and has, accordingly, been made since the testator's death, and I am of opinion that the Crown is not entitled to any benefit from the conversion so made, and that the interest of the deceased in the property was not subject to the probate duty, because, in fact, the interest of the deceased existed in the form of an equitable interest in land of inheritance, and not in the form of personal estate, in which form alone the administration of it could be granted by the probate."

Where, however, land directed by a testator to be absolutely converted into money results to the heir-at-law in consequence of a failure of some of the trusts, inasmuch as the heir-at-law, although there may have been no actual conversion, takes the undisposed-of interest, as personalty, it will as such be liable to probate and legacy duty upon the death of the heir-at-law. *The Attorney-General* v. *Lomas*, 9 L. R. Exch. 29.

And where a testator enters into a binding contract to sell land, and dies without receiving all the purchase-money, such part of it as is received by his executors is liable to probate duty, because it was received by them as part of the testator's personal estate. *The Attorney-General* v. *Brunning*, 8 Ho. Lo. Ca. 243, reversing the decision of the Court of Exchequer, reported 4 Hurls. & N. 94.

The question as to whether land is converted so as to be liable to legacy duty is not now of so much importance as it was formerly, as real estate is now liable to succession duty: 16 & 17 Vict. c. 51. See *ante*, p. 909.

Legacy and probate duty, however, as has been before shown, are, it seems, now payable on real estate notionally converted into personalty in equity, in consequence of its having been purchased with partnership capital, and used for partnership purposes in trade. See *Forbes* v. *Steven*, 10 L. R. Eq. 178, overruling what was supposed to be decided in *Custance* v. *Bradshaw*, 4 Hare, 315, and observations *ante*, pp. 219, 220.

Of the period from which conversion will be considered to commence.]—Where absolute conversion is directed to be made by deed, if no time for it be pointed out, it will take place from the delivery of the deed (*Griffiths* v. *Ricketts*, 7 Hare, 299; *Clarke* v. *Frankling*, 4 K. & J. 257); and in the case of a will it will take place from the death of testator (*Beauclerk* v. *Mead*, 2 Atk. 167; see *Ward* v. *Arch*, 15 Sim. 389, *Hutchin* v. *Mannington*, 1 Ves. jun. 366), even although there may be a direction that a sale should take place "whenever it should appear advantageous" (*Robinson* v. *Rob-*

inson, 19 Beav. 495); unless it be directed to take place at another time, as for instance upon the death of a person entitled for life independently of the will. *Fitzgerald* v. *Jervoise*, 5 Madd. 25.

Until conversion actually takes place, the person to whom the interest of the proceeds of the estate directed to be sold is given, will be entitled, in lieu thereof, to the rents of the estate. Thus, if an estate be devised to trustees upon trust for sale after the testator's death, or after the death of A., and to pay the interest of the proceeds to B., for life; B. will be entitled to the rents and profits of this estate in the first instance from the death of the testator; in the second from the death of A., until the sale of the estate takes place. *Casamajor* v. *Strode*, 19 Ves. 390 n.; *Fitzgerald* v. *Jervoise*, 5 Madd. 25, where the marginal note is inaccurate: *Miller* v. *Miller*, 13 L. R. Eq. 263.

When lands are directed to be sold and the proceeds to be invested in the purchase of other lands to be settled to the use of a person for life without impeachment of waste, although there is a direction that the rents and *profits* of the lands till sold, are to be to the use of the same persons who would be entitled to the lands to be purchased, the tenant for life cannot cut timber on the estate to be sold, because if he were allowed to do so on that estate as well as on that to be bought, he would have double waste; *Plymouth* v. *Archer*, 1 Bro. C. C. 159; *Burges* v. *Lamb*, 16 Ves. 180.

The conversion may be made by the owner to depend upon the option of third parties; as, for instance, trustees.

So, likewise, it may be made to depend upon the option to purchase at a future time, which when exercised after the death of the owner of the estate, will have a retrospective operation, to the time when the agreement giving the option was entered into. Thus in *Lawes* v. *Bennett*, 1 Cox, 167, Witterwronge, in 1758, demised a farm to Douglas, his executors, administrators, and assigns, for seven years, and there was an agreement endorsed upon the lease, that if Douglas should, before the 29th of Sept. 1765, give notice in writing of his wish to purchase the inheritance of the premises for 3000*l.*, Witterwronge agreed to sell and to execute to him a proper conveyance thereof. Witterwronge died in 1763, having by his will devised all his real estates to the defendant Bennett, and all his personal estate to the defendant Bennett and to the plaintiff, Mary, the sister of the defendant Bennett, equally as tenants in common. In 1762, Douglas assigned the lease, and the benefit of the agreement to Waller, and on the 2nd of February, 1765, Waller called upon Bennett to perform

the contract entered into by Witterwronge, for the sale of the premises for 3000*l.*, and he accordingly executed a conveyance to Waller in fee. Bennett having died, a bill was filed by Lawes, the husband of Bennett's sister, against the personal representative of Bennett, claiming a moiety of the 3000*l.* and interest, and Sir *Lloyd Kenyon*, M. R., decreed accordingly. "It is very clear," observed his Honor, "that if a man seised of a real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of Douglas whether it shall be real or personal. It seems to me to make no distinction at all. Suppose a man should bargain for the sale of timber, provided the buyer should give proper security for the payment of the money. This when cut down would be part of the personal estate, although it depends upon the buyer whether he give security or not; when the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period. . . . . I must, therefore, declare this 3000*l.* to be part of the personal estate of the testator, and that the plaintiffs are entitled to one moiety thereof."

In a recent case under the terms of a lease the tenant was bound to insure against fire, and had an option of purchasing the property. He insured in a sufficient sum. The premises were damaged by fire, and it then appeared that the landlord had a policy on the premises in another office, of which the tenant had no notice. The two offices apportioned the amount of loss between the two policies, and the landlord received what was thus payable under the policy effected by him. The tenant shortly after the fire gave notice to exercise his option of purchase, and proposed that the insurance moneys under both policies should go in part payment of the purchase-money. The landlord claimed to retain for his own benefit the money received under the policy effected by him, and insisted on the money under the other policy being applied in reinstating the premises, and on the tenant declining to do this brought ejectment against him. It was held by the Lords Justices, affirming the decision of *Malins*, V.-C., that the landlord was not entitled to retain for his own benefit the moneys received under the policy effected by him, nor to insist on the moneys being applied in reinstating the property, after the tenant had exercised his option of purchase. *Reynard* v. *Arnold*, 10 L. R. Ch. App. 386.

Until, however, in such a case

the option to purchase is exercised, the rents and profits will go to the persons who were entitled to the property up to that time, as real estate. Thus in *Townley* v. *Bedwell*, 14 Ves. 591, the testator in the cause granted a lease to Townley for thirty-three years, with a proviso that "if Townley, his executors, administrators, or assigns should be desirous to purchase the premises within six years, he, his executors, administrators, or assigns, should pay to the testator, his heirs or assigns, 600*l.* for the purchase, upon having a good title made to him, Townley, his executors, administrators, or assigns." The testator died without having devised the premises; and before the expiration of the lease, Townley declared his option to purchase according to the proviso. It was held by Lord *Eldon*, C. (though evidently with some reluctance), upon the authority of *Lawes* v. *Bennett*, that from the time of the option, Townley was entitled to the premises, and that he should pay interest upon the purchase-money, which money and interest he held to be personal estate of the testator, and which ought to go to his next of kin, but that the rents of the premises, until the option, belonged to the heir. So in *Ex parte Hardy*, 30 Beav. 206, a testator gave to his children in succession the option of purchasing his real estate, and in the meanwhile the rents were to be equally divided between them. Before an option had been exercised, and while some of the children were still infants, a corporation purchased part of the property for public improvements under compulsory parliamentary powers. It was held by Sir *John Romilly* M. R., that the shares of the children who had died infants remained real estate, until the option had been exercised, and that, in the meanwhile, the income of the purchase-money belonged to their heir-at-law. See also *Collingwood* v. *Row*, 3 Jur. N. S. 785, 5 W. R. 484, V.-C. K.; *Goold* v. *Teague*, 7 W. R. (V.-C. W.) 84; *Weeding* v. *Weeding*, 1 J. & H. 424; *Woods* v. *Hyde*, 10 W. R. (V.-C. W.) 339.

A specific devise, however, by name of the property, subject to the option, has been held to carry to the devisee the purchase-money also when the option was exercised; *Drant* v. *Vause*, 1 Y. & C. C. C. 580; and *Emuss* v. *Smith*, 2 De G. & Sm. 722. So likewise when, in the instrument by which the option is given, there is a direction that the purchase-money is to be paid to the person who is then owner of the estate, he alone will be entitled to it. See in *Re Graves Minors*, 15 Ir. Ch. Rep. 357, and the remarks of the Master of the Rolls *In Re Crofton*, 1 Ir. Eq. Rep. 204, and of Lord *Romilly*, M. R., in *Bowen* v. *Barlow*, 11 L. R. Eq. 454.

The question may arise, which

was suggested arguendo in *Lawes* v. *Bennett* (1 Cox, 170,) if the person having the option to purchase should release such option to the heir or devisee, whether a court of equity could afford any relief. There does not appear to be any express decision upon the point, but *Sir Lloyd Kenyon*, M. R., in his judgment, said he thought that a court of equity would give relief, "if it appeared to be done collusively to oust the legatee of his personal estate."

Where a person has an option given to him of purchasing land at a fixed price, and the land is purchased for a larger sum by a company under parliamentary powers before the time for exercising the option arrives, the person having the option will be entitled to the difference between the price fixed for him and the sum given by the railway company. In *Re Cant's Estate*, 4 De G. & Jo. 503, reversing *S. C.*, 1 Giff. 12.

Election to take property unconverted.] — Although land absolutely directed or agreed to be converted into money, and money directed or agreed to be converted into land, will immediately be impressed with the character of the property into which each is respectively to be converted, still this notional conversion may be put an end to by an *absolute owner*, who is competent to do so, electing to take the property in its actual state; and the Court will not direct a conversion against his election, because, when converted, he might immediately reconvert it; for, as is quaintly observed by Lord *Cowper*, in *Seeley* v. *Jago*, 1 P. Wms. 389, "Equity, like nature, will do nothing in vain."

An *infant* cannot ordinarily elect (*Carr* v. *Ellison*, 2 Bro. C. C. 56; *Van* v. *Barnett*, 19 Ves. 102); but where the property is the subject-matter of a suit, upon the certificate of the chief clerk, finding that it is for the benefit of the infant to do so, the Court may elect for him: *Robinson* v. *Robinson*, 19 Beav. 494.

A *lunatic* cannot elect: *Ashby* v. *Palmer*, 1 Mer. 296; *In re Wharton*, 5 De Gex, Mac. & G. 33.

A feme covert cannot, except as to property settled to her separate use (*Sharp* v. *St. Saveur*, 7 L. R. Ch. App. 343) elect, by a contract or ordinary deed (*Oldham* v. *Hughes*, 2 Atk. 452; *Frank* v. *Frank*, 3 My. & Cr. 171). But although, as observed by Lord *Hardwicke*, in *Oldham* v. *Hughes*, 2 Atk. 453, "a feme covert cannot alter the nature of money to be laid out in land, *barely* by a contract or deed; for, to alter the property of it, or course of descent, this money must be invested in land (and sometimes sham purchases have been made for that purpose), and she may then levy a fine of the land, and give it to her husband, or anybody

else; there is a way, also, of doing this, without laying the money out in land, and that is by coming into this Court, whereby the wife may consent to take this money as personal estate: and upon her being present in court, and being examined (as a feme covert upon a fine is), as to such consent, it binds this money articled to be laid out in land, as much as a fine at law would the land, and she may dispose of it to the husband, or anybody else; and the reason of it is this, that at law money so articled to be laid out in land, is considered barely as money, till an actual investiture, and the equity of this Court alone views it in the light of a real estate; and, therefore, this Court can act upon its own creature, and do what a fine at common law can upon land; and if the wife has craved aid of this Court, in the manner I have mentioned, she might have changed the nature of this money which is realised, but she cannot do it by deed." See also *Henley* v. *Webb*, 5 Madd. 407.

The necessity of making the sham purchases, alluded to by Lord *Hardwicke*, caused much inconvenience, which was attempted to be remedied by 39 & 40 Geo. 3, c. 56, and subsequently by 7 Geo. 4, c. 45; but these statutes have been repealed by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), whereby a married woman can, by deed executed in compliance with its provisions, make her election to take or dispose of money to be laid out in land. See Sects. 40, 71, 77, and 1 Hayes' Intro. 4th ed. 186; see also *Forbes* v. *Adams*, 9 Sim. 462.

So, likewise, a married woman may by a similar deed elect to take real estate directed to be converted into money (*May* v. *Roper*, 4 Sim. 360; and *Briggs* v. *Chamberlain*, 11 Hare, 69; *Franks* v. *Bollans*, 3 L. R. Ch. App. 717; *Bowyer* v. *Woodman*, 3 L. R. Eq. 313; sed vide *Hobby* v. *Collins*, 4 De Gex & Sm. 289), even though her interest be reversionary: *Tuer* v. *Turner*, 20 Beav. 560.

A married woman may, under the 7th section of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), dispose of her reversionary interest in real property to a railway company, so as to convert the proceeds into personalty: *Cooper* v. *Gostling*, 4 Giff. 449.

Where an estate is directed to be sold, and the money arising from the sale to be divided among several persons, none of them, as is laid down in the principal case, has a right to say that any part shall not be sold, and elect to take his share in land; for, to allow election in such a case, would be injurious to the sale of the entirety: *Deeth* v. *Hale*, 2 Moll. 317; *Smith* v. *Claxton*, 4 Madd. 484, 494; *Chalmer* v. *Bradley*, 1 J. & W. 59; *Trower* v. *Knightley*, 6 Madd.

134; *Holloway* v. *Radcliffe*, 23 Beav. 163, 171.

But if money be directed to be laid out in land, to the use of several persons as tenants in common, any one of them may elect to take his share of the money, for the residue of the money may be quite as advantageously invested in the purchase of land as the whole: *Seeley* v. *Jago*, 1 P. Wms. 389; *Walker* v. *Denne*, 2 Ves. jun. 182.

The question how far a remainderman can elect does not appear to be very clearly settled. If, however, in the case of money impressed with the character of land a remainderman were to elect to take it as money his election would be defeated upon the tenant for life electing to call for an investment in land, and if the remainderman died intestate, his heir-at-law would be entitled upon the death of the tenant for life: *Sisson* v. *Giles*, 3 De G. Jo. & Sm. 614.

It might, however, be supposed that if in such case the tenant for life died without having elected, the next of kin of the remainderman would be entitled; it seems, however, to have been laid down in a recent case that a person in the position of a remainderman, whose interest in the nature of the property is uncertain, as being dependent upon the option of the tenant for life, cannot elect in such a manner as to change its nature: see *Sisson* v. *Giles*, 3 De G. Jo. & Sm. 614; — where Lord *Westbury*, C., distinctly lays down the following very important proposition that, "in order to effect a reconversion, the parties directing it must be absolutely interested in the property in question. If they had only a limited or defeasible interest, there could be no conversion."

A remainderman may, however, by act inter vivos, or by will, dispose of property, either as real or personal, so that he describes it in such a manner as to show what he meant to pass: *Lingen* v. *Sowray*, 1 P. Wms. 172; *Harcourt* v. *Seymour*, 2 Sim. N. S. 12; *Re Skeggs*, 2 De G. J. & Sm. 533; *Stead* v. *Newdigate*, 2 Mer. 531; *Gillies* v. *Longland*, 4 De G. & Sm. 379; *re Stewart*, 1 Sm. & G. 32; *In re Pedder's Settlement*, 5 De G. M. & G. 890.

A tenant in tail of money to be invested in land might, as against his issue, whom he might bar by fine, elect to take it in its actual state, and upon his election immediate payment would be made to him by the Court (see *Benson* v. *Benson*, 1 P. Wms. 130; *Short* v. *Wood*, 1 P. Wms. 470; *Edwards* v. *Countess of Warwick*, 2 P. Wms. 173, and *Cuningham* v. *Moody*, 1 Ves. 176, overruling the decision of Lord Chancellor *King* in *Eyre's case*, 3 P. Wms. 13; and *Onslow's case*, *Ib.* note (*g*)); but where there were remainders over, payment would

not be made to the tenant in tail except by the consent of the remainderman, who could only be barred by a recovery: *Trafford* v. *Boehm*, 3 Atk. 440. "Upon a bill by tenant in fee," says Lord *Hardwicke*, "the Court would decree it to be paid in money, because he might immediately sell the land and turn it into money; and the old rule was, that the Court would also decree it so upon a bill by tenant in tail, with remainders over. And thus it stood, till the case of *Colwell* v. *Shadwell*, 1 P. Wms. 471, 485, where Lord *Cowper* held the remainderman should have his chance, as it could not be barred but by recovery, which required time, and would not direct it to be paid in money; and the accident of the death of tenant in tail in that case, before a recovery, showed the remainderman's interest in so glaring a light, that it has established the precedent ever since. But where the remainder can be barred by fine, the Court will decree it in money:" *Cuningham* v. *Moody*, 1 Ves. 176.

Notwithstanding some dicta to the contrary (*Pulteney* v. *Darlington*, 1 Bro. C. C. 236; *Pearson* v. *Lane*, 17 Ves. 106), it is not essential that the election by a tenant in tail alone, or a tenant in tail and the remainderman, should be made in a suit, for if the tenant in tail with remainder to himself received the money to be laid out in land from the trustees, or if the tenant in tail with remainder to a stranger, with the concurrence of the remainderman received it from the trustee, the election will be effectually made: *Trafford* v. *Boehm*, 3 Atk. 448; *Earl of Bath* v. *Earl of Bradford*, 2 Ves. 590.

By the Act for the Abolition of Fines and Recoveries (3 & 4 Will. 4, c. 74, s. 71) it is enacted, "that money to be invested in the purchase of lands, to be settled so that any person, if the lands were purchased, would have an estate tail therein, shall, for all the purposes of this Act, be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to: and all the previous clauses in this Act, so far as circumstances will admit, shall apply to such money, in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled."

When money has been paid into Court under the Lands Clauses Consolidation Act (8 Vict. c. 18, s. 69), or under the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120, s. 23) for the purchase of lands of which a person is tenant in tail, it has been held in some cases that the tenant in tail may obtain payment of the money out of Court without executing a disentailing

deed (*In re The South Eastern Railway Company*, 30 Beav. 215; *Re Holden*, 1 H. & M. 445; *Re Holden's Estate*, 10 Jur. (N. S.) 308; *Re Watson's Trust*, 10 Jur. (N. S.) 1011; *In re Row*, 17 L. R. Eq. 300; *In re Woods Settled Estates*, 20 L. R. Eq. 372; *Ex parte Maunsell*, 2 Ir. Rep. Eq. 32) the practice being in the Registrar's Office to have the petitions stamped as disentailing deeds: *In re Row*, 17 L. R. Eq. 301.

In other cases the order for payment has been only made conditionally upon the production to the Registrar of a properly executed disentailing deed: (*In re The Great Southern and Western Railway Company*; *Ex parte The Duke of Leinster*, 9 I. Eq. Rep. 482; *Re Tylden's Trust*, 11 W. R. (V.-C. K.) 869; *In re Butler's Will*, 16 L. R. Eq. 479; *In re Broadwood's Settled Estates*, 1 Ch. D. 438; *Re Limerick and Ennis Railway Company*, 10 I. R. E. 66); and this appears now to be the settled practice: *In re Reynolds*, 3 Ch. D. 61.

How election may be made.]—Supposing the person competent to elect, election may be made either by express declaration, or by acts from which the Court will presume an election to have been made.

An express declaration to elect may be made by parol, according to the opinion of Lord *Macclesfield* in *Edwards* v. *The Countess of Warwick* (2 P. Wms. 174); but in *Bradish* v. *Gee* (Amb. 229) Lord *Hardwicke* said, that although very slight evidence of the intention to elect would be sufficient, he could not admit that a parol declaration would be sufficient, as was intimated by Lord *Macclesfield* in *Edwards* v. *The Countess of Warwick*. However, in *Chaloner* v. *Butcher* (cited 3 Atk. 685), where the dispute was between the representative of personal estate and an heir-at-law, money on mortgage was agreed to be laid out in land for the husband for life, for the wife for life, and if no issue, for the husband absolutely, who, after the wife's death without issue, *declared it should not be laid out in land*; the Court held, that if the question concerned the right of a third person, the declarations of the husband should not be read; but as it was between his personal and real representative, they should be read, and determined it upon the declaration only. See, also, *Pulteney* v. *Lord Darlington*, 1 Bro. C.C. 237; *Wheldale* v. *Partridge*, 8 Ves. 236, where both Lord *Thurlow* and Lord *Eldon* consider that election may be declared by parol. The dictum, therefore, of Lord *Hardwicke* to the contrary may be considered as overruled.

Where a person entitled absolutely, or subject to a preceding life interest, to a fund to be invested in the purchase of land, bequeaths it by the description of so much money agreed to be laid

out in land, this bequest will shew a sufficient intention to elect to take the fund as personalty; and, therefore, being divested of the real uses, it would, previous to the late Wills Act, 1 Vict. c. 26, have passed to the legatee, although the will was unattested; but without such a particular interposition of the testator manifesting his intention, it would remain as land, and would consequently belong to the devisee or representative of the real, not of the personal estate. See *Pulteney* v. *Darlington*, 1 Bro. C. C. 235, 236; 3 P. Wms. note (*c*), and cases there cited.

So likewise a person absolutely entitled to land notionally converted into money, will be held to have elected to take it in its present state, by a devise thereof as all his landed property at a particular place. (*Sharp* v. *St. Sauveur*, 7 L. R. Ch. App. 343) and this a married woman may do with regard to property settled to her separate use. (*Ib.*)

The presumption that a person has made an election will arise from very slight circumstances: *Pulteney* v. *Darlington*, 1 Bro. C. C. 238; *Van* v. *Barnett*, 19 Ves. 109; *Cookson* v. *Cookson*, 12 C. & F. 121; *Dixon* v. *Gayfere*, 17 Beav. 433. Thus, if a person keeps land unsold, a presumption will arise that he elected to take it as land: (*Ashby* v. *Palmer*, 1 Mer. 301; *Crabtree* v. *Bramble*, 2 Atk. 688; *Inwood* v. *Twyne*, 2 Eden, 148); even when legacies to be payable out of the proceeds of the realty are unpaid, if the assent of the unpaid legatees to the election be expressed, or can from their conduct be inferred. *Mutlow* v. *Bigg*, 1 Ch. D. 385; but in *Kirkman* v. *Miles*, 13 Ves. 338, where the persons entitled to the proceeds to arise from the sale of land had entered upon and occupied it for two years, and neither they nor the trustees had taken any steps to sell the estate, nor had they made any requisition to the trustees for that purpose, Sir *William Grant*, M. R., held, "that only two years was too short to presume an election." In *Davies* v. *Ashford* (15 Sim. 44), real estates were, by marriage settlement, conveyed to trustees, in trust to sell, and to hold the proceeds in trust for the husband and wife for their lives successively, remainder in trust for their children, remainder in trust for the survivor of the husband and wife absolutely; there was no child of the marriage. The husband survived his wife, and after her death consulted his solicitors upon his rights under the settlement; and they, having advised him that he was entitled to the whole beneficial interest in the estate, he got possession of the settlement and of the title-deeds, and remained in possession of them, and also of the estates, until his death. It was held by Sir *L. Shadwell*, V.-C., that he thereby had elected to take the estates as land. "I admit," said

his Honor, "that the settlement contained a clear trust for sale, which must have been exercised unless the husband did some act which shewed that he meant the trust to be at an end, and to take the estates as land. It does not distinctly appear in whose custody the title-deeds originally were; but it is clear that there was a change in the possession of them, and that the husband got them into his custody. Now, was not that, of necessity, a destruction of the trust; for the trustees could not have compelled the husband to deliver up the deeds, and without doing so, they could not have made any effectual sale of the estates. Therefore, it seems to me, that, by consulting upon his rights under the settlement, and then taking the deeds into his possession (from whom or by what means he obtained them is immaterial), he made a clear election to take the estates as land." See also *Brown* v. *Brown*, 33 Beav. 399; *Sisson* v. *Giles*, 3 De G. Jo. & Sm. 614.

Although a person entitled to an *immediate* interest in lands directed by a will to be sold has, by his acts, shewn his intention to reconvert and take them in their actual state, this doctrine will not be applicable to lands devised by the same will, if the direction to convert only comes into operation *after* a life interest still in existence, for he would not by his acts, with reference to the lands in possession, have shewn his intention to reconvert those to which he was only entitled in remainder. See *Meredith* v. *Vick*, 23 Beav. 559.

Where securities for monies were assigned to trustees, to be invested in land to be settled upon a man and his wife for life, with an ultimate limitation to the man's right heirs; and the husband died after some of the money had been put out upon other securities, in trust for him, "*his executors and administrators*," Lord Keeper *Harcourt* held, that the husband had elected to take the securities as personal estate, upon the ground that the placing the money out upon different trusts was an alteration of the nature of it, since the testator's declaring the trust to *his executors and administrators*, seemed tantamount with his having declared that it should not go to his heirs: *Lingen* v. *Sowray*, 1 P. Wms. 172. See also *Cookson* v. *Cookson*, 12 C. & F. 121; *Harcourt* v. *Seymour*, 2 Sim. N. S. 12.

Upon the same principle, in the case of land to be converted into money, Lord *Hardwicke* held, that a grant of a lease, reserving rent to the grantor, *her heirs and assigns*, was strong evidence of the intention of the grantor to elect that it should continue as land. His Lordship observed that the grantor had reserved rents to herself, *her heirs and assigns*, and that it was said by the

plaintiff's counsel, that she could not do otherwise, and that it was very true that she could not; yet, though she could not reserve otherwise, there was equal reason in the present case to hold it as her intent that it should go to her heir, as in *Lingen* v. *Sowray*, to the executors, and that would be sufficient to determine the question between the representative of the personal estate and the heir: *Crabtree* v. *Bramble*, 3 Atk. 680, 689. See also *Griesbach* v. *Fremantle*, 17 Beav. 314.

Where the person absolutely entitled to money to be laid out in land receives the money from the trustees, he elects to take it as money: *Pulteney* v. *Lord Darlington*, 1 Bro. C. C. 238; *Trafford* v. *Boehm*, 3 Atk. 440; *Rook* v. *Worth*, 1 Ves. 461; but not where he receives the income, although for a considerable time: *Gillies* v. *Longlands*, 4 De G. & Sm. 372; *Re Pedder's Settlement*, 5 De G. Mac. & G. 890.

These remarks may be concluded with the observation, that the doctrine of conversion proceeds upon the principle, *that equity considers what ought to be done as done*. It follows, therefore, that the neglect of trustees to perform their duty, either by converting land into money or money into land, will not affect the rights of others. "The forbearance of the trustees," says Sir *J. Jekyll*, M. R., "in not doing what it was their office to have done, shall in no sort prejudice the cestui que trusts, since at that rate it would be in the power of trustees, either by doing or delaying to do their duty, to affect the right of other persons, which can never be maintained. Wherefore the rule in all such cases is, *that what ought to have been done shall be taken as done;* and a rule so powerful it is as to alter the very nature of things, to make money land, and on the contrary, turn land into money:" *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 215.

The law of conversion appears to be the same in Scotland as in England: *Buchanan* v. *Angus*, 4 Macqueen, Ho. Lo. Cas. 374.

As to conversion in certain cases by the Court or third parties independently of contract or will.]—With regard to the real estate of a bankrupt, vested in his assignees for payment of his creditors, it is clear that if any of it remain unsold before the death of the bankrupt, and the creditors have been fully satisfied, it will go, in case of intestacy, to his heir-at-law. *Bromley* v. *Goodere*, 1 Atk. 75.

The result will be the same in the case of real estate conveyed to trustees for the benefit of creditors, and which remains unsold after they have been satisfied: *Clissold* v. *Cork*, 27 L. T. R. (N. S.) 143; 20 W. R. (V.-C. W.) 796; nom. *Clissold* v. *Cook*.

Should the real estate of the bankrupt be sold or contracted to be sold in his lifetime, it will be considered as converted, and upon his death intestate, his heir-at-law will not be entitled to it, though he will be so if the sale or contract for sale be entered into after the death of the bankrupt. Thus in *Banks* v. *Scott*, 5 Madd. 493, parts of the real estate of the bankrupt Scott were sold during his life; parts were contracted to be sold, but not sold at the time of his death, and the remainder was sold after his death, and a surplus remained in the hands of his assignees. It was held by Sir *John Leach*, V.-C., that the heir of Scott, as such, had no claim in respect of the estates sold or contracted to be sold in the lifetime of Scott, but that he was entitled to the overplus after payment of creditors arising from the estates sold after the death of the bankrupt: "As to the real estates," said his Honor, "sold or contracted to be sold, during the life of the bankrupt Scott, it must at his death be considered as converted into personalty; but as to the real estate which was unsold and uncontracted for at the death of the bankrupt, it is to be considered as descending to his heir, subject to the charge created by provisions of the bankrupt laws for the payment of his debts. It can make no difference in principle whether such a charge be created by provision of the law, or the provision of the party. As far as the real estate is not exhausted by that charge, it is the property of the heir."

Where conversion is rightfully made, whether by a court of competent jurisdiction or a trustee, all the consequences of a conversion must follow; and there is no Equity in favour of the heir or any one else to take the property in any other form than that in which it is found: per *Sir G. Jessel*, M. R., in *Steed* v. *Preece*, 18 L. R. Eq. 197.

A *wrongful* conversion of property by trustees will not affect the interests of the cestui que trusts. Thus, if real property be wrongfully converted into personalty, or personalty into realty, each property so converted will be considered to retain its original character.

When, however, conversion takes place by the direction of a court of competent jurisdiction in Lunacy or Chancery (which must be presumed to have acted rightfully and lawfully, *In re Mary Smith*, a lunatic, 10 L. R. Ch. App. 84), the result, as will be hereafter seen, is different from the case where conversion is wrongfully made by a trustee; and as there are no equities between the heir-at-law and the next of kin, they will take the properties to which they are respectively entitled according to the character in which they find them.

In the case of a *lunatic*, the Court will not in general alter the state of a lunatic's property so as to affect his successors; it will however, do so when it is for the benefit of the lunatic himself; and in dealing with the property of a lunatic this principle is continually borne in mind by the Court.

This is well laid down by Lord *Loughborough*, in the leading case of *Oxenden* v. *Lord Compton*, 2 Ves. jun. 72. "In the series of orders," says his Lordship, "made by persons charged with the custody of lunatics there is one general principle, though I do not say it is without some possible deviation, that the general object of the attention of the administrator is *solely and entirely the interest of the lunatic himself*, and with regard to the management of the estate, solely and entirely the interest of the owner without looking to the interests of those who, upon his death, may have an eventual right of succession, and nothing could be more dangerous or mischievous than for him to consider how it would affect the successors. There will always be among them an emulation of each other; and their speculations, if the administrator was to engage in them, would mislead his attention and confine his observation as to the interest of the only person he is bound to take care of. The next of kin would contend for a short allowance. The heir would have no interest to contend for a short allowance out of the rents and profits, but might have an emulation against the next of kin: and, therefore, where the next of kin would contend for a narrow allowance, the heir would insist on a large one. Therefore the Courts have always shut out of their view all consideration of eventual interests, and consider only the immediate interest of the person under their care. If the interests of succession were to be respected by the Courts, I should expect not only precedents, but a continued course of accounting, that would manifest it to be the object of the attention of the Chancellor. There would be a continued running account between the personal and real estate."

Acting upon this principle, if an application were made to sell a part of the real estate of a lunatic for the payment of debts, if the Courts found that the maintenance of the lunatic would be better provided for, and his advantage promoted, by disposing of a real estate, inconvenient and ill-conditioned, and that it would be for the benefit of the lunatic so to pay the debts, and keep together the personal estate, the Court would have no difficulty in making an order upon such an application: per Lord *Eldon*, in *Ex parte Phillips*, 19 Ves. 124.

So a case has occurred of a lunatic, seised ex parte paternâ of

estate A., and ex parte maternâ of estate B., the latter being subject to a mortgage; and timber cut upon A. having been applied in discharge of the mortgage upon B., it was on a question between the heirs held that A. was not to be recouped. Per Lord *Eldon*, C., in *Ex parte Phillips*, 19 Ves. 123, 124. See, however, *Re Leeming*, 7 Jur. N. S. 115; 3 De G. F. & Jo. 43.

So timber may be ordered to be cut on a lunatic's estate, and applied in payment of debts or redemption of the land tax. *Ex parte Bromfield*, 1 Ves. jun. 455, 457; *Bevan's case*, cited 1 Ves. jun. 455, 457; *Ex parte Phillips*, 19 Ves. 118.

And the produce of timber cut and sold by the order of the Court on a lunatic's estate, although it may not be wanted for any particular purpose, will be considered on his death as part of his personal assets. *Ex parte Bromfield*, 1 Ves. jun. 453; *S. C.* 3 Bro. C. C. 510; *Oxenden* v. *Compton*, 2 Ves. jun. 69; *S. C.* 4 Bro. C. C. 231; *Ex parte Phillips*, 19 Ves. 118, overruling the dictum of Lord *Hardwicke* in *Marquis of Anandale* v. *Marchioness of Anandale*, 2 Ves. 384.

Where the Court of Chancery directs the sale of shares belonging to a lunatic, and invests the proceeds in a different manner, a bequest of the shares will be adeemed, and fall into the residue unless the Court, in the order for sale of the shares, directs that the proceeds were to go to the same persons as would have been entitled to the shares. See *Jones* v. *Green*, 5 L. R. Eq. 555. There a testator, by will, bequeathed the income of shares in the Assam Company for certain specific purposes, and bequeathed the shares to his residuary legatee. After the date of his will he was found to be of unsound mind, and by an order in the lunacy the shares were directed to be sold, and the proceeds were invested in consols. It was held by *Giffard*, V.-C., that as the provisions of the Lunacy Regulation Act (16 & 17 Vict. c. 70), whereby the rights of owners of property sold by the order of the Lord Chancellor in Lunacy are preserved, extend only to "land" (as defined in the interpretation clause), the bequest of income was adeemed by the sale, and the consols fell into the residue. "No doubt," said his Honor, "by inadvertence, there has been an omission in the Lunacy Regulation Act, 1843. It has not been, nor can it possibly be contended, that these Assam shares were included in the Statute. The Act must, therefore, be put aside, and the state of things considered wholly without it. Now the order in lunacy was plain. There might, no doubt, have been a direction accompanying the order that the proceeds of the shares were to

belong to the same persons as were the owners of the original shares. But the order contains no such provision. What, then, is the result? All the authorities shew that the conversion must be treated as a lawful conversion, exactly as if the testator had himself converted the shares into consols. Such an act on his part would clearly have adeemed the gift."

Where it is for his benefit, the personal estate of a lunatic will be laid out by the Court on necessary expenses of his real estate, such as for repairs (*Sergeson* v. *Sealey*, 2 Atk. 414; *Ex parte Grimstone*, Amb. 708; *S. C.*, cited 4 Bro. C. C. 235, n., 2 Ves. jun. 74; *In re Badcock*, 4 My. & Cr. 440), for renewals of leaseholds, or admissions to copyholds (*Ex parte Grimstone*, 2 Ves. jun. 75, n.; but see *Degge's case*, cited 4 Bro. C. C. 235 n.), or in improvements (*Ex parte Grimstone*, cited 2 Ves. jun. 75, n.), or in such an outlay as the erection of a fire engine in a colliery (*Oxenden* v. *Compton*, 2 Ves. jun. 73).

In some cases it has been held that where a mortgage on the lunatic's real estate has been paid out of his personal estate, the next of kin had no claim as against the real estate for the amount expended in its exoneration (*Ex parte Grimstone*, Amb. 706; *S. C.*, 4 Bro. C. C. 235, cited); in more recent cases the claim of the next of kin has been upheld. See *Weld* v. *Tew*, Beatt. 272; *Re Leeming*, 3 De G. F. & Jo. 43; 7 Jur. N. S. 115.

The Court, however, in the exercise of its discretion in the management of a lunatic's estate, will not lightly, or when it is uncalled for, and even it is said only upon pressing occasions, change one species of property into another: *Ex parte Bromfield*, 1 Ves. jun. 463, 3 Bro. C. C. 515; *Oxenden* v. *Compton*, 2 Ves. jun. 76, 4 Bro. C. C. 234; *Ex parte Grimstone*, cited 4 Bro. C. C. 235, n.; *Sergeson* v. *Sealey*, 2 Atk. 414.

In lunacy, the Court, it seems, cannot dispose of the real estate of a lunatic, except under the provisions of the Lunacy Regulation Act, 1853 (17 & 18 Vict. c. 70), the 124th section of which gives power to the Court to direct the committee to sell or join in the sale or partition of the lunatic's land, and the legislature provides by the 135th section that the proceeds of such sale shall be held as real estate. See *In re Mary Smith* (a lunatic), 10 L. R. Ch. App. 79, in which case both money arising from the sale of part of a lunatic's estate, and also money being a gross sum payable by instalments for the right to take minerals for a certain term of years on another part of such estate (and which was considered equivalent to a sale and not a lease), were, after a confirmation of the transaction by the Court, held under the Lunacy

Regulation Act to go as real estate to the heir-at-law of the lunatic. See *In Re Wharton*, 5 De G. Macn. & G. 33.

Committees of lunatics ought not to exercise their statutory powers of sale without the consent of the Lord Chancellor. *In Re Wade*, 1 H. & Tw. 202; *In Re Taylor*, 1 H. & Tw. 432.

If, however, the committees of a lunatic took upon themselves without leave of the Court for their own advantage to change the property of the lunatic, they would not be allowed to take advantage of their own wrong. Thus in *Ex parte Ludlow*, 2 Atk. 407, the committees of a lunatic's estate, *who were entitled to it themselves after his death* laid out 25*l.* in buying timber for the repairs of barns, rather than take it from the estate, notwithstanding there was timber upon it proper for that purpose, Lord *Hardwicke*, C., held the committees liable to refund the 25*l.* to the personal estate. "I am of opinion," said his Lordship, "that committees of the real estate of a lunatic may exercise the same power over it in regard to cutting timber for repairs, as any discreet person who was the absolute owner might do. And, therefore, the committees of this estate must make good this sum of 25*l.* to the personal estate, *for they appear to me to have done this merely with regard to their own interest, as the reversion of the real estate belongs to them.*" And see *Ex parte Bromfield*, 1 Ves. 462; *Anon.*, 2 Freem. 114; *Awdley* v. *Awdley*, 2 Vern. 192; so in the case of *In re Badcock*, 4 My. & Cr. 440, Lord *Cottenham*, said—"that if money belonging to a lunatic were laid out in the purchase of land, or what would amount to the same thing, in building a farmhouse, it would be right that the sum so laid out should retain its character of personalty."

It seems, however, that if timber has been cut down on a lunatic's estate by a stranger tortiously, inasmuch as there has been no abuse of confidence, and the heir has no equity against the personal representatives, the timber or its proceeds will not be restored to the heir-at-law: *Ex parte Bromfield*, 1 Ves. jun. 463, 3 Bro. C. C. 515.

As to the jurisdiction of the Lord Chancellor to order the sale of the property of a lunatic not found such by inquisition when it does not exceed 1000*l.* in value, or the income thereof, 50*l.* a year, see 25 & 26 Vict. c. 86, ss. 12 and 13.

With regard to the conversion of the property of *infants*, Lord *Thurlow* in one case said that "he could not distinguish between lunatics and infants:" *Ex parte Bromfield*, 1 Ves. jun. 461, 3 Bro. C. C. 515.

However, until the passing of the Wills Act, this distinction existed between an adult lunatic and an infant, an adult lunatic on

his recovery always had, though by different modes, the same power of disposition both over his real and personal property; to convert, therefore, one species of property into another, would not injure the lunatic. An infant, however, before the passing of the Wills Act, might dispose of personal estate before he attained the age of twenty-one, but he could not devise real estate before he attained that age. The Court, therefore, would not convert his personalty into realty, because that would deprive him of a power of disposition which the law gave to him over personalty; nor would it convert realty into personalty, because by so doing a power would have been conferred upon him contrary to the policy of the law. Lord *Eldon* thus lays down the law on this subject—"In the case of an infant it is settled, that as a trustee out of court cannot change the nature of the property, so the Court, which is only a trustee, must act as the trustee out of court; and finding that a change will be for the benefit of the infant, must so deal with it as not to affect the powers of an infant over his property even during his infancy; when he has powers over one species of property and not over the other. It may be for the benefit of an infant in many cases, that money should be laid out in land, if he should live to become adult; but if not, it is a great prejudice to him, taking away his dominion by the power of disposition he has over personal estate so long before he has it over real estate. The Court, therefore, with reference to his situation even during infancy, as to his powers over property, works the change, not to all intents and purposes, but with this qualification that if he lives he may take it as real estate, but without prejudice to his right over it during infancy as personal property:" *Ex parte Phillips*, 19 Ves. 122; and see *Witter* v. *Witter*, 3 P. *Wms.* 99; *Rook* v. *Worth*, 1 Ves. 461; *Sergeson* v. *Sealey*, 2 Atk. 413; *Ashburton* v. *Ashburton*, 6 Ves. 6; *Ware* v. *Polhill*, 11 Ves. 278; *sed vide Earl of Winchilsea* v. *Norcliffe*, 1 Vern. 435; *Inwood* v. *Twyne*, 2 Eden, 152.

Accordingly, it has been held that except in the case of *necessary expenses*, such as for repairs (*Ex parte Grimstone*, 4 Bro. C. C. note, 235), keeping up a house (*Ex parte Grimstone*, Amb. 708), paying for an estate devised to an infant in consideration of his paying the purchase-money (*Vernon* v. *Vernon*, cited 1 Ves. jun. 456), for which purposes the infant's personalty has been held to be applicable, no conversion of his property from one species to another would be allowed.

Thus the proceeds of timber cut on the estate of an infant would, it seems, be considered as part of the realty, and descend to the heir: *Tullit* v. *Tullit*, Amb. 370, 1 Dick. 322; *Ex parte Phil-*

lips, 19 Ves. 124; sed vide *Ex parte Bromfield*, 3 Bro. C. C. 516.

A distinction was taken in the case of *Mason* v. *Mason*, cited Amb. 371, between the case of timber cut on the estate of an infant seised in tail, and an infant seised in fee, inasmuch as in the latter case the timber being taken as realty went to the infant absolutely, whereas, in the former case, if it were taken as realty, it might go to the remainderman, and it ought therefore to be taken as personalty. And Sir *Thomas Clarke*, M. R., in a subsequent case, allowed of the distinction as taken in *Mason* v. *Mason*. See *Tullit* v. *Tullit*, Amb. 371.

Moreover, where the personal estate of the infant has been applied in paying off a charge or redeeming a mortgage, it has been ordered that it shall be considered as personal estate for the benefit of the infant. See *Ex parte Bromfield*, 3 Bro. C. C. 516; *Seys* v. *Price*, 9 Mod. 220; *Tullet* v. *Tullet*, 1 Dick. 323; sed vide *Ex parte Grimstone*, Amb. 708; *Zoach* v. *Lloyd*, cited 2 Vern. 192; *Dennis* v. *Badd*, cited *Ib.* 193; and see *Earl of Winchilsea* v. *Norcliffe*, 1 Vern. 436. Lord *Eldon*, in a well-known case, says, "I have uniformly made it a rule, since I have sat here, where property of one nature has been applied for the benefit of an infant to property of another nature, to have an express provision, that if he shall not attain the age at which he shall have a disposable power, the representative shall not be prejudiced in any degree by the act done by the Court in contemplation of the infant's benefit, in all the circumstances surprise or accident can throw round it:" *Ware* v. *Polhill*, 11 Ves. 278.

Even if the Court forgets to make such declaration the law is the same, and it is a matter of course to reform the order, because, says Lord *Eldon*, "The order does not create the right, but is a declaration of a pre-existing right so to have the property secured:" *Ware* v. *Polhill*, 11 Ves. 278. In a case, however, where, during the minority of a tenant for life, of land, part of the income had been expended under the order of the Court in improving the property, Lord *Romilly*, M. R., held that the Court had no power to declare the sum so expended a charge on the property, even though the tenant for life died an infant and the order had been made in the presence of the remainderman: *Floyer* v. *Bankes*, 8 L. R. Eq. 115.

In the case of descendible freeholds of an infant the line of descent may be altered, by the act of a guardian of the infant, as by the renewal of a lease for lives of which the infant is seised ex parte maternâ, for the new lease being considered as a new acquisition, and vesting in the infant as a purchaser, will descend to the

heirs ex parte paternâ, as it is immaterial to the infant which of the heirs takes it. And it was said by Lord *Hardwicke*, C., "to be not like the case of an infant's personal estate turned into real; for the reason of that being still considered as personal estate, is, because of the different ages at which the infant might dispose of his personal, and his real estate, and not out of favour to any one representative more than another: *Pierson* v. *Shore*, 1 Atk. 480; *Mason* v. *Day*, Prec. Ch. 319.

By the Wills Act, 1 Vict. c. 26, an infant has no more power by will over personal estate than over real estate; the reason, therefore, for the distinction, running through the decisions, between the conversion of the property of infants and lunatics, no longer exists; and it would seem, therefore, that where the Court for the benefit of an infant converts property of one description into property of another description, that, as in case of the property of lunatics similarly converted, it ought to go to the heir-at-law or next of kin, according to its character at the death of the infant.

In the recent case of *Dyer* v. *Dyer*, 34 Beav. 504, timber which was deteriorating was cut by order of the Court, and for the benefit of the estate, on the property of an infant, who was equitable *tenant in fee* subject to an executory devise over in the event of his dying under twenty-one without issue. He afterwards died under twenty-one without issue. It was held by Sir *John Romilly*, M. R., that the proceeds of the sale of the timber were the personal estate of the infant. "If," said his Honor, "the Court in administering the real estate of an infant, finds that it would be for his benefit to cut the timber, the produce belongs to him as personal estate, and the Court does not consider whether, if he dies in his infancy, his heir-at-law or next of kin would take it; but it simply directs the timber to be felled for the benefit of the person who is then the owner of the fee simple. Thereby so much of the realty is converted into personalty; not when the order is made, but at the time when the timber is severed. In my opinion, the fact of this young man having died before he attained twenty-one, no more alters the character of the timber or of the money derived from it, than if he had died two or three days after attaining twenty-one; nor does the fact that there is an executory devise over, in the event of his dying under twenty-one without issue make any difference. Now let us see if the cases are not consistent with this. In *Oxenden* v. *Lord Compton* (2 Ves. jun. 69), the Court in dealing with the estate of a lunatic, cut timber during his life. When it was severed it became personalty, and on the death of the lunatic as

personalty went to his next of kin, and not to his heir-at-law."

In this case it will be observed that the Master of the Rolls makes no distinction between timber felled by the order of the Court on the estate of an infant, and timber felled on the estate of a lunatic. This point, however, does not, according to the reports referred to, appear to have been argued before him.

Where, however, during the life of a person having a *limited interest*, timber is directed to be cut on a settled estate, the proceeds of the timber will be considered as realty until some person absolutely entitled thereto elects to take them as personalty. See *Field* v. *Brown*, 27 Beav. 90.

Where a mortgage deed of freehold estate contains a power of sale, with a direction that the surplus monies to arise from the sale shall be paid to the mortgagor, *his executors or administrators*, if the estate is sold by the mortgagee in the *lifetime* of the mortgagor, then the surplus monies will be the personal estate of the mortgagor; but if the estate be unsold at the death of the mortgagor, the equity of redemption devolves upon his heir or devisee; if a sale should subsequently take place, the heir or devisee, as the case may be, will be entitled to the surplus produce: *Wright* v. *Rose*, 2 S. & S. 323, 324. See also *Bourne* v. *Bourne*, 2 Hare, 35, ante, p. 918; *Re Cooper's Trust*, 4 De G. Mac. & G. 768. *In re Smith's Mortgage Account*, 9 W. R. (M. R.) 799.

In the case of *In re Underwood*, 3 K. & J. 745, where, in consideration of money lent, real estate was conveyed to the lender, his heirs and assigns, upon trust, in case the principal money and interest should be paid by a given day, for the borrower his heirs or assigns; but in case default should be made, then upon trusts for sale, and the trusts of the purchase-money were declared to be for the payment of the principal money, interest and costs, and subject thereto for the borrower, "*his executors, administrators or assigns;*" default having been made, it was held that the trust of the surplus being for the borrower, "his executors, administrators or assigns," and not for him, "his heirs or assigns," the deed operated to convert the property as between his real and personal representatives. It was therefore more than "merely a security for money"—more, that is, than "a mortgage," as defined by the 2nd section of the Trustee Act, 1850; it was a deed of trust within the meaning of the 15th section of that Act; and the lender having died intestate, and it being impossible to find his heir, the Court had power to make a vesting order under that section.

The question has been recently much discussed, whether when realty has been converted by the Court or trustees for a particular

purpose which does not exhaust the whole proceeds of the sale, the surplus is to be considered realty or personalty. *Flanagan* v. *Flanagan* (ante, p. 900) is in favour of the surplus being taken as personalty. The decision of Vice-Chancellor *Shadwell* in *Jermy* v. *Preston*, 13 Sim. 356, appears to be the other way. And in a subsequent case where under a decree of the Court more real estate had been sold than was necessary for payment of mortgage or other debts, (which was the only object of the sale) the surplus was still held to retain the character of realty. See *Cooke* v. *Dealey*, 22 Beav. 196. There an estate was devised to a married woman, subject to the payment of the testator's debts. The estates were afterwards sold under a decree in an administration suit to which the devisee was a party. After payment of debts there remained a sum in court. On the death of the devisee, it was held by Sir *John Romilly*, M. R., that the heir-at-law of the devisee, and not her husband, was entitled to the sum in court. "More of the real estate," said his Honor, "was sold than necessary; of course the conversion is complete to the extent to which the purchase-money was required for the particular object for which the sale took place, namely, for the payment of the debts and costs, but the excess, though in the form of money, remained as before impressed with the character of land. The money was raised by sale instead of by mortgage, and for the convenience of the purchaser too much was sold: the excess, therefore, beyond what was required, retains its original character of realty. . . . . I am, therefore, of opinion that all the money not required for the purpose of the suit, and not disposed of in the performance of the order and decree of the Court, belongs to the parties in its original character, that is, it remains real estate, and goes to the heir-at-law." See also *Lancaster* v. *Evors*, 1 Ph. 349; *Johnson* v. *Webster*, 4 De G. Mac. & G. 484; *Dyer* v. *Dyer*, 34 Beav. 504.

Recently the case of *Flanagan* v. *Flanagan* has been followed, and the cases of *Jermy* v. *Preston* (13 Sim. 356) and *Cooke* v. *Dealey* (22 Beav. 196) questioned. See *Steed* v. *Preece*, 18 L. R. Eq. 192; there two persons, one an infant, the other adult, were entitled in Equity to real estate as tenants in common in tail, with cross remainders between them. A suit was instituted by trustees for administration of the trusts of the instrument under which these persons were entitled, and also asking for partition, and a decree was made by which (the Court being of opinion that a sale would be for the benefit of the infant defendant, and the adult defendant consenting) a sale was ordered. A sale was made under

the decree, and the purchase-money paid into Court, and upon further consideration the adult's share was paid to him, and the infant's share carried to his separate account. The infant afterwards died without having attained twenty-one. It was held by Sir *G. Jessel*, M. R., that the fund in Court belonged to his legal personal representatives, and was not to be treated as realty. "The estate" said his Honor, "has been properly converted into money; and as between volunteers—which both administrators and remaindermen are—it has been laid down (*Oxenden* v. *Lord Compton*, 2 Ves. 69, 70) that they must take the estate as they found it. . . . But then, it is said, that the decree was partially wrong. Now, as to that, the case of *Flanagan* v. *Flanagan* (ante, p. 900) appears to me unanswerable. I am aware that the decision of Sir *L. Shadwell* in *Jermy* v. *Preston* (13 Sim. 356), and the decision of Lord *Romilly*, in *Cooke* v. *Dealey* (22 Beav. 196), appear at first sight to be antagonistic to this. In *Jermy* v. *Preston* the report does not state the trusts of the term, the estate subject to which had been sold; but counsel on both sides appear to have said that the Court had sold more than was necessary. How that could be is difficult to understand, for it appears from the report that the decree ordered a sale or mortgage, with the Master's approbation, of a sufficient part of the estates comprised in the term, and that the Master made a report approving of the sale, by which he must have found that a sufficient part was sold.

"Again, the judgment in *Cooke* v. *Dealey* (22 Beav. 196) is based on a general principle assumed to have been laid down in *Ackroyd* v. *Smithson* (1 Bro. C. C. 503), viz., that the conversion of real estate into personalty only takes effect to the extent of the object required, and that beyond this the rights of the parties remain the same as if no conversion had taken place. But all that *Ackroyd* v. *Smithson* decided was, that a conversion directed by a testator is a conversion only for the purposes of the will, and that all that is not wanted for these purposes must go to the person who would have been entitled but for the will. It does not decide that if the Court or a trustee sell more than is necessary, there is any equity to reconvert the surplus for the benefit of the heir-at-law of the person entitled at the time of the sale. As I have already remarked, it is not necessary to decide that question now; but it seems to me that if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of a conversion must follow; and that there is no equity in favour of the heir or any one else to take the property in any other form than

that in which it is found: and that the sole question to be considered in all these cases is, whether the estate has been rightfully or wrongfully sold."

And the result will be the same where a party interested in real estate directed to be sold dies before the sale actually takes place. See *Arnold* v. *Dixon*, 19 L. R. Eq. 113; there, in an administration suit, asking also for partition of real estate, the Court directed a sale, but before it was effected one of the parties interested in the real estate died intestate. It was held by Sir *Charles Hall*, V.-C., upon the authority of *Steed* v. *Preece*, that the estate was sufficiently converted, and the estate having been sold, the share of the deceased intestate passed to his legal personal representatives.

But where a decree ordering real estate devised in strict settlement to be sold for payment of debts, directed that if more were sold than was sufficient for that purpose, the surplus should be laid out in land to be settled to the same uses as the devised estate, the heir-at-law of the person entitled in fee to the devised estate under the ultimate limitation, was held entitled to the surplus as real estate: *Fellow* v. *Jermyn*, W. N., 28 April, 1877, p. 95.

The result will be the same where there is an equity in favour of the heir or any one else for reconversion. See *Foster* v. *Foster*, 1 Ch. D. 588; there real estate, to a share of which infants were entitled, was sold under the decree in a partition suit. It was held by Sir *G. Jessel*, M. R., that the proceeds of the sale must be treated as realty, by force of the 8th section of the Partition Act, 1868 (31 & 32 Vict. c. 40), incorporating the provisions of sections 23 to 25 of the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120).

Where money is paid into court, the produce of real estate converted by compulsory powers under acts of parliament, it in general remains in court subject to the rights of the parties interested in it to have it reinvested in land, and it is to be considered as money or personal estate in court, subject to a trust to be invested in land, and therefore impressed with the quality of real estate (*In re Stewart*, 1 Sm. & G. 32, 39; *The Midland Counties Railway Company* v. *Oswin*, 1 Coll. 80; *In re Taylor's Settlement*, 9 Hare, 596) until some act is done by the owner showing his election to take it as personalty: *In re Horner's Estate*, 5 De G. & Sm. 483; *In re Stewart*, 1 Sm. & Giff. 39.

Where land had been taken by a company under the Lands Clauses Consolidation Act, from a person who was, and continued until his death, in a state of mental imbecility, *but was not the subject of a commission of lunacy*, and the money was paid

into court, it was held by Lord *Cranworth*, V.-C., after the death of the landowner, that the money was not to be reinvested in or considered as land, but to be paid to his personal representatives: his Lordship being of opinion, that the money ought to be treated "as being paid in by a party seised in fee and competent to sell." See *Ex parte Flamank*, 1 Sim. N. S. 260.

In the recent case, however, of *Kelland* v. *Fulford*, W. N., April 14, 1877, p. 79, lands of which an infant was seised in fee, and whose estate was being administered by the Court, were taken by a railway company, and the purchase-money paid into Court under the 69th sect. of the Lands Clauses Consolidation Act, and invested in consols. The infant having died, intestate, it was held by Sir *G. Jessel*, M. R., that the fund continued impressed with the character of real estate, and accordingly passed to the heir-at-law.

As to the question of conversion arising upon the construction of local Acts; see *Shard* v. *Shard*, 14 Ves. 348; *Cramer's Case*, 1 Sm. & G. 32; *In re Taylor's Settlement*, 9 Hare, 596; *Midland Counties Railway Company* v. *Oswin*, 1 Coll. 80; *In re Harrop*, 3 Drew. 726; *In re Robertson*, 3 Jur. N. S. 784; *Dixie* v. *Wright*, 32 Beav. 662; *Re Skegg's Settlement*, 2 De G. Jo. & Sm. 533; *Cadman* v. *Cadman*, 13 L. R. (Eq.) 470.

By the Irish Church Act, 1869 (32 & 33 Vict. c. 42), every advowson, with perpetual right of presentation to a living in the Established Church in Ireland, was converted into personalty, viz., the right to receive the compensation which should be assessed by the Commissioners: see *Frewen* v. *Frewen*, 10 L. R. Ch. App. 610, where it was held that the executors of a testator and not the devisees of his livings were entitled to the compensation under the act.

AKCROYD *v.* SMITHSON (*a*).

(*a*) This report was copied by Mr. Brown from the notes of Lord *Eldon*. —From Lord *Redesdale's* MSS.

Lincoln's-Inn Hall, 4th March, 1780.

[REPORTED 1 BRO. C. C. 503.]

RESULTING TRUST ON FAILURE OF THE PURPOSES FOR WHICH CONVERSION HAS BEEN DIRECTED.]—*Testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies to be paid out of the proceeds arising from the sale, and the residue thereof he gave to certain legatees, in the proportion of their legacies. Two of the residuary legatees died, living the testator. These shares are lapsed; and so far as they are constituted of personal estate, shall go to the next of kin, and so far as they are constituted of real estate, to the heir-at-law.*

CHRISTOPHER HOLDSWORTH, by his will gave (int. al.) to the defendants, Smithson and Ibbetson, their executors and administrators, 200*l.*, in trust to put the same out at interest, and to apply the interest in bringing up the defendant Mary Bracklebank, then an infant, till twenty-one, the principal to be paid to her at twenty-one, and, if she died before twenty-one, then to be paid to her representative: and bequeathed to the Rev. Thomas Whitaker, 100*l.*; to James Roberts and William Roberts 100*l.* each; to Grace Ogle 200*l.*; to George, Ann, and Phœbe Ogle, her children, 100*l.* each; to Joseph Scurr, 200*l.*; to Benjamin Wright, 200*l.*; to Mrs. Molyneaux, 400*l.*; to Hannah Close, 150*l.*; to William Hawkeswell, 100*l.*; to Mary Ross, 200*l.*; to Joseph Marshall, 200*l.*— all which legacies, together with other legacies given by his will, he directed to be paid at the end of six months after his decease; and the said testator thereby gave all his messuages, cottages, lands, tenements, and hereditaments,

situate at the Bank, in the township of Leeds, with their appurtenances, and all his real estate not thereinbefore devised, and all his household goods and furniture, plate, linen, stock in trade, and all his personal estate whatsoever, unto the defendants Smithson and Ibbetson, their heirs, executors, administrators, and assigns, to hold the same to them, their heirs, executors, administrators, and assigns, for ever, *in trust that they should, as soon as convenient after his decease, sell all his said messuages, &c., for such price or prices as could be got for the same, and thereby to convert such real and personal estate so to them devised, and every part thereof, into ready money,* and by and out of the money arising by such sale to pay all his debts, legacies, and funeral expenses, and charges of proving his will; and after payment thereof, and retaining to themselves 50*l.* each, which he thereby gave them for their trouble, in trust out of such monies to arise as aforesaid, to pay all legacies and annuities thereby bequeathed, at the time and in the manner thereby directed; and if, after such payments made, and putting out of the funds, as thereby directed, for raising the annuities thereby given, and indemnifying his trustees from all charges, expenses, and loss which might attend the carrying the trusts of his will into execution, there should remain an overplus in the hands of the trustees, which he apprehended there would be to a considerable amount, he directed that they and the survivors of them should, within six months after the same should be ascertained, pay the same unto his said legatees, Thomas Whitaker, James Roberts, William Roberts, Grace Ogle, George Ogle, Ann and Phœbe Ogle, Joseph Scurr, Benjamin Wright, Mrs. Molyneaux, H. Close, William Hawkeswell, Mary Bracklebank, Mary Ross, and Joseph Marshall, in proportion to their several and respective legacies therein to them bequeathed; and the testator thereby willed and devised that two several sums of 250*l.* each, which he had therein directed to be put out on securities in the names of his trustees, and the interest arising therefrom to be respectively paid to M. Thackeray

and R. Gaunt during their respective lives, should, upon the several deaths of them, the said M. Thackeray and R. Gaunt, be paid in the like proportions unto them his said several and respective legatees.

Benjamin Wright and Mrs. Molyneux died in the lifetime of the testator.

The bill was filed by the next of kin of the testator against the surviving legatees and the heir-at-law claiming the legacies given to the deceased legatees, their shares in the overplus, and in the two sums of 250*l.* as lapsed and become part of the personal estate of the testator.

The cause came on at the Rolls, 10th July 1778, when his Honor (Sir *Thomas Sewell*), being of opinion that the surviving legatees took the whole residue, in proportion to their several legacies, dismissed the bill without costs.

From this decree the plaintiffs appealed to the Lord Chancellor *Thurlow*, and, the cause coming on to be heard before his Lordship,

Mr. *Kenyon* attempted to support the decree.

But Lord Chancellor *Thurlow* being clear (without hearing much argument) that this was a tenancy in common in the residue, and that, therefore, the shares of the legatees who died in the testator's lifetime were undisposed of, said the only question was, whether such shares belonged wholly to the next of kin or to the heir-at-law.

The *Attorney-General* (*a*), Mr. *Madocks*, and Mr. *Selwyn* (for the plaintiffs, next of kin), contended, that the testator had converted his real estate into money out and out; that he had mixed two funds, and made all personal estate; that the cases, therefore, of *Mallabar* v. *Mallabar* (Cas. temp. Talb. 79), and *Durour* v. *Motteux* (1 Ves. 320), must govern the decision here, and that the blending the funds distinguished this case from that of *Digby* v. *Legard* (cited 1 Bro. C. C. 501. Mr. *Selwyn* mentioned the cases of *Flanagan* v. *Flanagan* (cited 1 Bro. C. C. 500), *Fletcher*

(*a*) Alexander Wedderburne, Esq., afterwards Earl of Rosslyn.

v. *Ashburner* (1 Bro. C. C. 497), and *Ogle* v. *Cook* (cited 1 Bro. C. C. 501).

Lord Chancellor *Thurlow* thought the two former cases did not apply, but being in general of opinion with the counsel for the next of kin, asked the counsel for the heir-at-law upon what grounds they could support his claim.

(*a*) Afterwards Earl of Eldon, from whose notes this argument is taken.

Mr. *Scott* (*a*), for the heir-at-law, said, they claimed on his behalf such interest in the monies produced by the sale of the testator's real estates, as the deceased residuary legatee would have been entitled to, if they had survived the testator; or so much of their shares of the overplus, now in the events which have happened, undisposed of, as is constituted by the produce of the testator's real estate. That the heir-at-law is entitled to every interest in land not disposed of by his ancestor, is so much of a truism that it calls for no reasoning to support it. It is not necessary for the heir-at-law to deny that the intention of the testator has designed him nothing; his intention has certainly been equally unpropitious to his next of kin; but it is not enough that the testator did not intend that his heir should take: he must make a disposition in favour of another; if he has not actually disposed of all his real estate, if he has not made an universal heir, the law will give such part of his real estate as he has not actually and eventually disposed of, even against his intention, and á fortiori in a case where he has expressed no intention, to the hæres natus. If the interest of the deceased legatees had been an interest in the produce of mere real estate, not blended with the produce of personal estate, it has been admitted, upon both hearings, that the benefit of lapsed devises would, according to the case of *Digby* v. *Legard*, and the principle of the case of *Emblyn* v. *Freeman*, Prec. Ch. 541, and of many others, have accrued to the heir-at-law. It is admitted, and cannot be denied, that where a testator directs real estate to be sold for special purposes, if any of those purposes become incapable of taking effect, the heir-at-law shall take; because there is an end of the

disposition when there is an end of the purposes for which it was made; but it is contended here, the testator had not a special intention, but that he meant the produce of his real estate should be considered as personal estate; that he intended to convert it out and out; that he has not kept the funds distinct, but that he has blended them so as to be incapable of being distinguished, and that the cases, therefore, of *Durour* v. *Motteux*, and *Mallabar* v. *Mallabar*, are authorities in point, that the whole fund is personal. We admit that a person may decide what shall be the nature of his property after his death, so as to preclude all questions between real and personal representatives. But we insist, that if he has not actually and eventually so decided, they, upon whom the law casts the title to personal estate, can no more claim in a court of equity money arising from the sale of land, than the heir can claim property admitted to be of a personal nature. As to the question of fact, whether he meant that, in some event only, or that, in all events, the produce of his real estates should be considered as personalty, we admit that, in favour of his residuary legatees, he meant to convert the whole into personalty, in case all his residuary legatees should eventually take the whole; but we contend, that he has intimated no intention as to that part of the produce, as to which his disposition in the event which has happened, has failed of effect. He converts it out and out, indeed, if you speak of his intention as to the qualities of the property, which his legatees were to take; but, as to such part of the property as, in the event, they have not taken, he has not determined upon its nature; he never meant to determine upon its nature, as between his heir-at-law and his personal representative or next of kin, because he appears not to have adverted to the possibility of any events taking place, which would give the one or the other an interest in his property, and he designed no part of his property for either. In the event, the one or other must take some part of it; but, to say he has made it all personal property, and that therefore the law must give it

to the next of kin, is to apply an argument deduced from what was the testator's intention in case events had taken place which had not occurred, for the sake of proving a similar intention, if circumstances happened directly contrary to those with relation to which only the testator framed his intention. To argue from what the testator intended with respect to residuary legatees, by way of proving that he intended the same in favour of his next of kin, is to reason from a case in which intention is expressed, to prove a like intention in a case which supposes the absence of intention; though the testator, therefore, intended that his legatees, if they had lived, should take their respective shares of such part of the general surplus as was produced by the sale of the real estates as money, he has not declared any intention relative to its nature, in case that particular intent of his should be disappointed. In the event, therefore, which has happened, it is so much money undisposed of, arising from the sale of lands. Such money in this court is land, and as such the heir claims it. Suppose all the fifteen legatees had died in the lifetime of the testator, would it not have been competent to the heir-at-law to have insisted in equity, that no sale should be made of the real estate? Would it have been possible to contend that, because the testator had blended the funds, in order to make a disposition which never took effect, and without a view to any other given circumstances, that he had therefore blended them, if, in the event, he had made no disposition; that, because he had made the real estate personal, to give it to his residuary legatees, and to disappoint his heir, he meant also to disappoint his heir, whether his residuary legatees did or did not, in the event, take the benefit of that disposition? The fact of his having blended the funds proves not a mere inattention, not mere indifference to the interest both of his next of kin and his heir-at-law, but it proves a purpose hostile to both. Can that fact, then, be a ground from whence to infer that, in a change of circumstances, he had a purpose of kindness and bounty to the next of kin, and

adverse to the interest of the heir only? The reason of the intention ceasing, the intention should be taken to have ceased. The testator meant to change the legal qualities of his property, when he meant to alter the disposition which the law would make of his property; but if, in the event, the law was to make the disposition of any part of the property, he meant, for aught that appears to the contrary (and something must appear to the contrary, to defeat the claim of the heir), that the law which made the disposition should decide on the qualities of the property of which it was to dispose. If, then, in case all the residuary legatees had died, the heir could have prevented a sale, is it to be said, that, because a sale must be made, he shall not have that part of its produce which the objects of the testator's bounty cannot take? It is not true, that where it is necessary that a sale should be made, to effectuate the testator's purposes which are capable of taking effect, that such sale will convert the nature of that part of its produce which cannot be applied according to the testator's intention. In the case of *Emblyn* v. *Freeman* (Prec. Ch. 541), the heir was held entitled to 200*l.* arising from the sale of real estate, which the testator had made liable to an appointment by note, concerning which he made no appointment; and there a sale was necessary. In the case of *Digby* v. *Legard*, where the heir was held entitled to the benefit of the devise, lapsed by the death of one of five tenants in common, of money to be raised by sale of real estates in the lifetime of the testator, the heir could not possibly prevent a sale; as to the cases of *Mallabar* v. *Mallabar*, and *Durour* v. *Motteux*, they can be considered as authorities only by those who do not attend to the distinction submitted above; they are so far from deciding the case, that they establish no principle which applies to it. In *Mallabar* v. *Mallabar*, the real and personal estate are not blended by the terms of the devise in the beginning of the will, which is a devise of real estate only, upon trust to sell, and that, out of the monies arising therefrom, the testator's debts should be paid; and after pay-

ment thereof he devised, out of the remainder of the money, 500*l.* to his sister, Mary Bainbridge; 500*l.* to his sister's two children that should be living at the time of his decease, equally to be divided between them: 500*l.* to his nephew, Nicholas, who was his heir-at-law: 500*l.* to be divided amongst the children of his late brother, James Mallabar, living at his decease. Then follows the clause which was held to blend the funds:—"Item, after all my debts and legacies paid, I give and bequeath all the rest and residue of my personal estate unto my sister Esther Mallabar, and appoint her executrix." The question was, whether there was a resulting trust for the heir, as to the money arising from the sale of the real estate, after payment of the debts and the several sums of 500*l.* The Court held, that the testator had made all his property personal; or rather, it inferred, from the purpose of the testator, as far as that could be collected, from the will, that the testator meant by the residuary clause, to describe not only money strictly personal estate, but the money claimed by the heir likewise: the Court inferred this from the circumstance of the heir's having a legacy of 500*l.* out of that very money, and because, if a different construction was made, the sister, his executrix, to whom the testator clearly intended to give a beneficial interest, would have taken nothing but a troublesome office: for if the words, "the residue of the personal estate," did not include this money, the personal estate must have been first applied to pay the debts and legacies, in exoneration of the real estates charged therewith by the will, and the executrix would have had an office of trouble, without the benefit intended her. But, though the Court considered the surplus of the money as personalty, as between her (whom it held to be a residuary legatee) and the heir, to effectuate the testator's intention, does it follow that, if the testator had died intestate as to the surplus, as the testator here did as to a part of it, that the Court would have determined against the heir, in favour of the next of kin, in whose favour no such argument as to intention could

have been urged? If the residuary legatee had died in the testator's lifetime, the will must have had the same construction as if the residuary clause had not been inserted; for, where the residuary clause has no operation to any substantial purpose, it cannot be considered as a part of the will; if it had not been inserted, the devise of the real estate would have been a devise to pay debts and legacies merely. In such case, then, it is clear that, as to the surplus, there would have been a resulting trust for the heir; the debts and the sums of 500*l.* being paid, the testator's intention would have been satisfied to the extent in which it could take effect; there would then have been an end of the disposition. There is no difference between such a case and the present case, except that, in that case, there is no residuary legatee as to any part of the surplus; here, there is none as to some part of it: there, there is a general intestacy as to the surplus—here, a partial intestacy: but the effect of a partial intestacy must be the same as to the part, as the effect of a general intestacy is to the whole. The case of *Durour* v. *Motteux* is also a case between residuary legatees and the heir-at-law. There the testator gave all his real estates, to sell and dispose of the whole with his personal estate, blending them for payment of his debts, legacies, and funeral expenses, and performance of his will; he gave several legacies, and among the rest 1200*l.*, or thereabouts, whereof part was to be laid out in the purchase of freehold lands for charitable uses, some of which were confessedly within the Mortmain Act (9 Geo. 2, c. 36), and the rest determined to be so; the question was whether the 1200*l.* should go to the heir-at-law, or to the residuary legatees. Lord *Hardwicke* said, that he was of opinion that the money which should arise by the sale of the real estate was turned into personal, and so intended by the testator, it plainly appearing that, by the description of all his personal estate, he meant to include the whole in the residue, so that it is to be considered now as personal estate; then it comes to this: a will is made in which there are several legacies, and the residue of the

personal estate is given away; one of the personal legacies is void by law; the Court cannot say, for that reason, that he intended to die intestate, for giving the residue over includes everything, let it fall in by reason of the legacies being void, or lapsing in the life of the testator. Now here the reasoning of the Court is grounded upon the testator's intention to give his residuary legatees everything which was not otherwise effectually disposed of. And the testator was held to have converted his real estate out and out into personal estate, to effectuate that intention; for the residuary legatees could not otherwise take the 1200*l.* But if the residuary legatees had died in the lifetime of the testator, and the next of kin had been called upon to sustain the question against the heir, the reasoning of the Court would not apply; arguments from intention in their favour could not be resorted to, and the Court might have said, and must have said, that the testator meant to die intestate as to the surplus, if there was no residuary legatee named in his will living at his death. It could not in that case have been said that the testator meant, by the description of all his personal estate to include the whole in the residue, and therefore the void legacy of 1200*l.* among the rest, because the will, in that case, must be considered as if nothing concerning the residue had been inserted in it. Here he meant to make one fund of the whole, to effectuate his intended disposition of the whole; but if subsequent events defeated that disposition, his intention in case it took effect, is no proof that he had the same intention in case it did not take effect. If there had been no residuary clause, and if the residuary legatees had been dead, it could have no effect, and therefore could not have been attended to. In *Durour* v. *Motteux* it would have been nothing more than a devise of real and personal estate for payment of debts, valid legacies, and funeral expenses: it would have been then a disposition with a special intention: that intention being satisfied, there would have been a resulting trust as to the surplus. It is said, if this way of reasoning was good, it would have

entitled the heir to the 1200*l.* in the case of *Durour* v. *Motteux;* for it was the testator's intention there, that the same sum should be considered as money only in case the charity took it; that the testator never adverted to the event which happened—viz. the residuary legatees taking it—an event which he as little thought of as he did of the next of kin's taking the residue. The answer is, the rule of law would not suffer, in that case, what no rule forbids in this; the law says, where there is a residuary legatee, the testator shall be presumed to mean that he should take whatever lapses, either by the death of the legatees, or whatever is not given according to law (*a*). So long as there is any person to take, who is declared by the testator to be preferred by him to those whom the law appoints to succeed him, the heir can have no claim. If the testator spoke for himself he would say, If my special intention of kindness to the charity fails, my general intention of bounty to my residuary legatee shall take place; but where the residuary legatee is removed, there is nothing like a declaration by the testator in favour of the next of kin, to entitle them to succeed the residuary legatees, as there is where there is a general residuary clause in a will in favour of the persons named in it, to succeed the particular legatees; and to money arising by the sale of land, there can be no claim in the next of his kin but what arises from the declaration of the testator; for, unless he directs or expresses that it shall be considered as personalty, the heir must take it. We admit the heir, then, to be excluded whilst there are any persons who can take the produce of the real estate under the will,—the declaration of the testator's intention: we deny that he is excluded by any who make their claim not under the will, but in defect of the will: or that the intention in the will can affect those who claim, upon the ground that there is no will which relates to the subject. The case of *Cruse* v. *Barley* and *Banson*, before Sir *Joseph Jekyll* (3 P. Wms. 20), seems to establish those principles, for it shows that where any part of the produce of the real estate is so given as to prove that it was not the

(*a*) See *Cambridge* v. *Rous*, 8 Ves. 23; *Slackford* v. *Long*, 7 Ir. Ch. Rep. 87.

testator's intention, in case that part should lapse, that it should go to the residuary legatees, but that he has given them the residue exclusive of that part, it shall not go as undisposed personalty to the next of kin. Why should the next of kin take, in preference to the heir, what the residuary legatees cannot take for another reason—namely, removal by death? The case was: William Banson, seised in fee of freehold and copyhold lands, which he had surrendered to the use of his will, and being much indebted by mortgages, and having a wife and five children, devised all his freehold and copyhold lands to the defendant Barley and his heirs, in trust to sell for the best price, and in the first place to pay off all his incumbrances and his debts. He also devised his personal estate to the same trustee, in trust to sell, and after the testator's debts paid, to apply the money arising by sale of the personal estate, and also the money to be produced by sale of the real estate, among his five children, in manner therein after mentioned: to his eldest son 200*l.* at his age of twenty-one, all the rest and residue thereof among his four younger children at twenty-one, and with benefit of survivorship. The eldest son died under twenty-one; the question was, what was to become of the 200*l.*? The Master of the Rolls thought it would not go to the younger children, who were only to have the residue, but to the heir. It was objected, that all is made personal estate; the surplus of the money arising from the sale of the real and personal estate, is to go to the hæredes facti. There could be no doubt, it was urged, if the eldest son had died in the testator's life, it would have been a lapsed residuum: but his Honor, after looking into precedents, declared for the heir, that it was the same as if so much land as was of the value of 200*l.* had not been to be sold, but suffered to descend. As to the case of *Flanagan* v. *Flanagan*, it is perfectly different from this; that was a question between the real and personal representative of a person entitled under the will of the testator. The land was sold under a decree of the Court, in a cause in which the person, through whom both claimed, was party;

and the decree had ordered the surplus, if there should be any, to be paid to James Flanagan, the father, and James Flanagan, the son, equally. The sale was made under the decree; and, the question arising between the real and personal representative of Flanagan, the father, the Court determined the surplus should have the same nature with respect to them as the decree had given it with respect to Flanagan the father. In that case, too, the testator had, foreseeing that a sale could not be made which would produce the exact sum and no more, directed his trustees to convey the residue of the real estate which should remain unsold, or pay the produce of such part as should be sold, and all other the residue of his real estates between the father and the son.

Scudamore v. *Scudamore* (Prec. Ch. 513) is not to this point: it determines, that the representatives of a person entitled under a will, shall take money, as money or as land according as the person whose representatives they are would have taken it; but it decides nothing between the heir and personal representative of the testator himself. There is no case in which the next of kin have been considered as entitled against the heir, in the event of a lapse of the whole or a part of the residue, except the case of *Ogle* v. *Cooke* (*a*), heard 19th February, 1748, which so far as it relates to this subject was this: Mr. Ogle made his will in 1744, and gave his real estate to trustees to sell and vest the money in stock, and pay the interest to his wife during her widowhood, and, after her death or marriage, the principal to his two daughters equally, except that the eldest was to have 1000*l.* more than the other: he gave the residue of his personal estate in the same way. He afterwards executed a conveyance, in trust to sell for payment of his debts, which was held a revocation pro tanto only, and part was sold. One of the daughters died in Mr. Ogle's life. The bill was brought by the widow and the eldest daughter, against the son, the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the deceased daughter as personal estate of Mr. Ogle, to be divided

(*a*) See *Collins* v. *Wakeman*, 2 Ves. jun. 686, where Lord *Loughborough* says, that he had caused the Reg. Lib. to be examined, and it was found that the point supposed to have been decided by *Ogle* v. *Cooke*, was in reality left undecided. It is, therefore, no longer an authority.

between them and the son. The son insisted that her share was to be considered as real estate: the Court decreed the residue of the estate to be sold, and that the produce should be considered as Mr. Ogle's personal estate. Here it cannot be denied, that the intention of the testator to convert this estate into money for the sake of his daughters, was taken to be a sufficient ground for the Court's considering the moiety, which in the event was undisposed, as personal estate: but the case of *Digby* v. *Legard* is a later authority, and contradicts the doctrine of that case. The cases are not in any respect different, except in the number of the persons interested in the produce. The daughters, in the case of *Ogle* v. *Cooke*, indeed, had an interest in the personal as well as real estate, which was not given in that of *Digby* v. *Legard*; but the funds are kept separate, and not blended, in *Ogle* v. *Cooke*. The determination in the latter case, we submit, is neither justified by principle nor by authority. The case of *Ogle* v. *Cooke*, admits the deceased daughter's moiety, in both the real and personal funds, to be undisposed, but it supposes that the conversion, which the testator made with a view to a disposition, is to take effect, though the disposition does not take effect. Upon the whole, we contend that, if the shares of the deceased legatees in the overplus are undisposed, parts of those shares being constituted by money arising from the sale of real estate, the heir is entitled to such part; that the intention of the testator, in the events that have happened, does not destroy his claim; and that this is a case to which the principles of the adjudications cited by the counsel for the next of kin, do not apply.

Lord Chancellor Thurlow reversed the decree, and directed an account to be taken of the personal estate, and the money arising from the sale of the real estate, and that the share of the deceased legatees in the overplus should be divided between the next of kin and the heir; that is, so much of those shares as was constituted of the personal estate, to the next of kin, and so

much as was made up of the produce of the real estate, to the heir.

He said, that he fully approved the determination in *Digby* v. *Legard*. That he used to think, when it was necessary for any purposes of the testator's disposition, to convert the land into money, that the undisposed money would be personalty; but the cases fully proved the contrary. It would be too much to say, that if all the legatees had died, the heir could, as he certainly might, he said, prevent a sale, and yet to say that, because a sale was necessary, the heir should not take the undisposed part of the produce. The heir must stand in the place of the residuary legatees who died, as to the produce of the real estate. He said, he approved the distinctions made on behalf of the heir, and decreed as before.

Since the case of *Ackroyd* v. *Smithson*, so celebrated for the elaborate argument of Lord *Eldon*, then Mr. *Scott*, it has never been doubted, that, where a testator directs real estate to be sold, and the produce of the sale to be applied for a purpose which either wholly or partially fails, the undisposed-of beneficial interest will result to his heir-at-law, and will not go to his next of kin, although the land may have been actually converted into money. In *Ackroyd* v. *Smithson*, it will be observed that the disposition of the money to arise from the sale of the real estate was originally complete, but a lapse by the death of two of the residuary legatees in the lifetime of the testator, caused the failure of the disposition as to their two shares, which, although actually converted into money, resulted to the heir-at-law as undisposed-of real estate.

So likewise where money impressed with the character of realty, passes under a general devise, although there be a trust for sale, it will operate merely as a conversion for the purposes of the will, and upon a lapse of a share taking place on the death of one of the devisees, it will result for the benefit of the heir-at-law, and not the next of kin of the testator. In *Re Taylor's Settlement*, 9 Hare, 596, 604. See also *Salt* v. *Chattaway*, 3 Beav. 576.

Upon the same principle, where a partial disposition only is originally made of the money to arise from the sale of land, the portion undisposed of will result to the heir-at-law: *Robinson* v. *Taylor*, 2 Bro. C. C. 589; *Berry* v. *Usher*, 11 Ves. 87; *Wilson* v. *Major*, 11

Ves. 205; *Watson* v. *Hayes*, 5 My. & Cr. 125.

The same result follows where money arising from land directed to be sold is given over on an event which does not happen. Thus, in *Jessop* v. *Watson*, 1 My. & K. 665, a testator directed a mixed fund, composed of the produce of his real and personal estate, to be applied to certain specified purposes, and the residue to be divided equally among his children, or child, at twenty-one, if sons, and twenty-one or marriage, if daughters, and if there was no child who should become entitled under the trusts, to such person as he should by his codicil appoint. The testator died without having made a codicil, leaving an only daughter, his heiress-at-law, who died under twenty-one, intestate and unmarried. Sir *J. Leach*, M. R., held, that so much of the residuary fund as was constituted of real estate descended to the heiress, and that so much as was constituted of personal property went to the next of kin. See, also, *Fitch* v. *Weber*, 6 Hare, 145; *Roberts* v. *Walker*, 1 Russ. & My. 752.

So, also, where land is directed to be converted into money, and the whole, or part, is given for a purpose which fails on account of illegality, the whole or part which, on this account, remains undisposed of, results to the heir-at-law. As, for instance, where money, to arise from the sale of land, is given to a charity, and the gift is void according to the Statute of Mortmain (9 Geo. 2, c. 36) (*Attorney-General* v. *Lord Weymouth*, Amb. 20; *Jones* v. *Mitchell*, 1 S. & S. 294; *Hopkinson* v. *Ellis*, 10 Beav. 169; and see *Brook* v. *Badley*, 3 L. R. Ch. App. 672); or under The Act for the more effectual application of charitable donations and bequests in Ireland (7 & 8 Vict. c. 97, s. 16) by reason of the devisor dying within three calendar months from the execution of the will (*Hamilton* v. *Foot*, 6 I. R. Eq. 572); or is limited so that the bequest is void, as violating the rule against perpetuities (*Burley* v. *Evelyn*, 16 Sim. 290; *Buchanan* v. *Harrison*, 1 J. & H. 662). So, where, as in *Eyre* v. *Marsden*, 2 Kee. 564, accumulations are directed to be made out of the income of land to be converted into money, for more than twenty-one years from the death of the testator, and therefore void under the Thellusson Act (39 & 40 Geo. 3, c. 98), as to the excess of the accumulation over the twenty-one years, such void accumulations will result to the heir-at-law, and not to the next of kin. "It happens," observes Lord *Langdale*, M. R., in *Eyre* v. *Marsden*, "that there is a failure of the testator's intent. The income of the money arising from the sale of the real estates cannot be allowed to accumulate, and applied as the testator meant. The purposes of the will, as far as

they can be lawfully carried into effect, do not exhaust the whole beneficial interest arising out of the real estate, and I think that the heir is entitled to the unexhausted interest." See *S. C.*, 4 My. & C. 231.

The principle upon which these cases proceed has been thus laid down by Lord *Eldon*: "Where," says his Lordship, "a testator means, with regard to a particular purpose, to convert his real estate into personal, if that purpose cannot be served, the Court will not infer an intention to convert the estate for any other purpose not expressed:" *Hill* v. *Cock*, 1 V. & B. 175; and see *Bective* v. *Hodgson*, 10 Ho. Lo. Ca. 656; *S. C.*, nom. *Hodgson* v. *Bective*, 1 Hem. & Mill. 376.

Where, however, a testator by his will disposes of an existing charge upon real estate, directing it to be laid out in land, and accumulations to be made out of the income thereof, so as to be partially good under the Thellusson Act, the excess of accumulations over the twenty-one years will go to the next of kin of the testator and not the heir at law: *Simmons* v. *Pitt*, 8 L. R. Ch. App. 978. In this case (which, it will be observed, is the converse of *Eyre* v. *Marsden*, 1 Keen, 456) the charge was disposed of as personal estate, and was personal estate before it was appointed, and therefore the accumulations so far as they were void, went, notwithstanding the direction to convert into land, to the next of kin as personal estate.

In *Ackroyd* v. *Smithson*, it was argued, for the next of kin, that the fact of the testator having mixed the real with the personal estate, showed an intention on his part to convert the real into personal estate out and out, for all intents and purposes, and not merely for the purposes of the will. This argument, however, was most successfully refuted by Lord *Eldon*, who, admitting that it was the testator's intention to convert the real into personal estate, out and out, for the purposes of the will, that is to say, for the residuary legatees, contended, that it was impossible to infer from such intention in favour of the residuary legatees, a similar intention in favour of the next of kin, whom the testator never had in contemplation; and that to argue from what the testator intended with respect to residuary legatees, by way of proving that he intended the same in favour of the next of kin, was to reason from a case in which intention was expressed, to prove a like intention in a case which supposed the absence of intention.

It was decided, also, in *Jessop* v. *Watson* (1 My. & Kee. 667), upon the authority of the principal case, that the blending of the proceeds of real with personal estate for an express purpose which fails, will not operate so as to convert the real into personal estate for a purpose not expressed, viz., so as to

give it to the next of kin. The case of *Ogle* v. *Cooke*, cited in the principal case, was for a long time considered an exception from the general rule; but in *Collins* v. *Wakeman*, 2 Ves. jun. 686, Lord *Loughborough* observes, that he had caused the Reg. Lib. to be searched, and it was found that the point had been left undecided. *Ogle* v. *Cooke*, therefore, is no authority whatever on this subject.

Upon the same principle, even an express direction that the proceeds of the sale of real estate shall be deemed personalty will not prevent the operation of the rule in favour of the heir-at-law; for however absolute such direction for conversion may be, it will be construed to extend to the purposes of the will only. See *Collins* v. *Wakeman*, 2 Ves. jun. 683; *Countess of Bristol* v. *Hungerford*, 2 Vern. 645. See, however, the report of that case, Prec. Ch. 81, and the note to *Rogers* v. *Rogers*, 3 P. Wms. 193, where it is stated, that the Court held, that the executors were trustees for the next of kin of the testator, but they happened also to be his co-heirs. This case, therefore, can be considered as of no authority either way. *Phillips* v. *Phillips*, 1 My. & Kee. 649, is, indeed, a decision against the claims of the heir; but it must be considered as overruled by subsequent cases. See *Williams* v. *Williams*, Rolls, 13th Dec. 1835, L. J., Part V. N. S. 84; *Roberts* v. *Walker*, 1 Russ. & My. 752; *Henchman* v. *The Attorney-General*, 3 My. & Kee. 485; *Amphlett* v. *Parke*, 2 Russ. & My. 221; *Johnson* v. *Woods*, 2 Beav. 409; *Shalleross* v. *Wright*, 12 Beav. 505; *Gordon* v. *Atkinson*, 1 De Gex & S. 478; *Taylor* v. *Taylor*, 3 De G. M. & G. 190; *Robinson* v. *Governors of the London Hospital*, 10 Hare, 19; *Ellis* v. *Bartrum*, 25 Beav. 110; *Barrs* v. *Fewkes*, 2 Hem. & Mill. 60; *Bedford* v. *Bedford*, 35 Beav. 584.

And although a direction that the proceeds of real estate shall be deemed personalty be followed by an express declaration that it shall not lapse for the benefit of the heir-at-law, he will not be excluded from what the law in the absence of such declaration would give to him. Thus, in *Fitch* v. *Weber* (6 Hare, 145), a testatrix devised and bequeathed her real and personal estate, in trust as to the real estate for sale as soon after her decease as conveniently could be, and declared that the trustees should stand possessed of the proceeds of the sale, *as a fund of personal and not real estate; for which purpose she declared such proceeds or any part thereof, should not in any event lapse or result for the benefit of her heir-at-law:* and, after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects as she should by any codicil to that her will, direct or appoint. The testatrix

made no codicil. Sir *James Wigram*, V. C., after an elaborate examination of the authorities, held, that the heir-at-law was entitled to the proceeds of the real estate undisposed of by the will. "I feel myself called upon," observed his Honor, "to follow the course of decisions, in holding that the testatrix has expressed an intention to exclude the heir *only for the purposes of her will*, and that, if her words express more, and she has failed to say who shall take the surplus, the law must dispose of it." And see *Flint* v. *Warren*, 14 Sim. 554, 16 Sim. 124; *Bromley* v. *Wright*, 7 Hare, 334, 344; *Johnson* v. *Johnson*, 4 Beav. 318.

Mr. Cox, in a note to *Cruse* v. *Barley*, 3 P. Wms. 22, which has been highly commended by many eminent equity judges, states his opinion, that the several cases on this subject seem to depend upon this question—*whether the testator meant to give to the produce of the real estate the quality of personalty to all intents, or only so far as respected the particular purposes of the will:* for that unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personalty *for the purposes of the will*, but further that the produce of the real estate shall be taken as personalty, whether such purposes take effect or not, so much of the real estate, or the produce thereof, as is not effectually disposed of by the will at the time of the testator's death (whether from the silence or inefficacy of the will itself, or from subsequent lapse), will result to the heir. In the opinion of a learned writer, which seems to be fully warranted by the authorities, this statement of the doctrine, although correct as far as it goes, is not sufficiently explicit, and requires the following explanatory addition: "But that every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin:" 1 Jarman on Wills, 530, 2nd ed.

Whether real property directed to be sold results to the heir as real or personal estate.]—This question sometimes arises between the real and personal representatives of the heir. The following rules for deciding this question, where conversion is directed by will, may be laid down as the general result of the cases.

First, where it is necessary to sell the land for the purposes of the trust, and there is only a partial disposition of the produce of the sale, there the surplus belongs to the heir as money, and not as land, and will, therefore, go to

his personal representative, even though the land may not have been sold during his lifetime; and, previous to the late Wills Act (1 Vict. c. 26) coming into operation, it would have passed by an unattested will of the heir as personalty. See *Wright* v. *Wright*, 16 Ves. 188; *Smith* v. *Claxton*, 4 Madd. 484; *Dixon* v. *Dawson*, 2 S. & S. 327; *Jessop* v. *Watson*, 1 My. & K. 665; *Hatfield* v. *Pryme*, 2 Coll. 204; *Wilson* v. *Coles*, 28 Beav. 215; *Wall* v. *Colshead*, 2 De G. & Jo. 683; *Attorney-General* v. *Lomas*, 9 L. R. Exch. 29; *Hamilton* v. *Foot*, 6 I. R. Eq. 572, 578.

Secondly, where a sale is unnecessary, by reason of a total failure of the purposes for which the conversion was directed, the heir will take the estate as realty, descendible to his heir, and devisable only by a will, attested so as to pass real estate (*Chitty* v. *Parker*, 2 Ves. jun. 271. See remarks on this case in *Attorney-General* v. *Lomas*, 9 L. R. Exch. 35; *Bagster* v. *Fackerell*, 26 Beav. 469; *Buchanan* v. *Harrison*, 1 J. & H. 662); and a sale unnecessarily made by trustees will not vary the rights of the parties, as the proceeds will in that case be considered as the real estate of the heir (*Davenport* v. *Coltman*, 12 Sim. 610; and see *Cooke* v. *Dealey*, 22 Beav. 196); and if the testator were seised *ex parte maternâ*, his heir in the maternal line will be entitled thereto: *Hutchison* v. *Hammond*, 3 Bro. C. C. 128; *Wood* v. *Skelton*, 6 Sim. 176; *Buchanan* v. *Harrison*, 1 J. & H. 673.

This doctrine has been very clearly illustrated by Sir *John Leach*, M. R., in *Smith* v. *Claxton*, 4 Madd. 492. "Where a devisor," observes his Honor, "directs his lands to be sold, and the produce divided between A. and B., the obvious purpose of the testator is, that there shall be a sale, for the convenience of division; and A. and B. take their several interests as money, and not land. So, if A. dies in the lifetime of the devisor, and the heir stands in his place, the purpose of the devisor, that there shall be a sale for the convenience of division, still applies to the case; and the heir will take the share of A. as A. would have taken it—as money, and not land. But in the case put, let it be supposed that A. and B. both died in the lifetime of the devisor, and the whole interest in the land descends to the heir; the question would then be, whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the devisor being, that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devisees wholly failed; and the heir would, therefore, take the whole interest as land." See

also *Bagster* v. *Fackerell*, 26 Beav. 469; *Wall* v. *Colshead*, 2 De G. & Jo. 683.

There is a material distinction as to the application of the doctrine of resulting trusts between those cases where conversion wholly or partially fails when it is directed by a will, and when it is directed by a deed. In the case of conversion of land directed by will, it has been already shown that the *devisor's heir* takes what is undisposed of according to the circumstances of the case, either as realty or personalty.

Where conversion, however, is directed by a deed, there, as the deed operates not as a will from the time of the devisor's death, but from the time of the delivery of the deed, whatever is undisposed of results to the settlor and not to his heir; whether it results as personal estate, or as realty, depends upon the circumstance whether the objects for which conversion was directed wholly or partially failed.

Where there is a trust by deed for the conversion of real into personal estate for certain specified purposes, *some only of which fail*, there, whether the trust for sale is to arise in the lifetime of the settlor or not until after his decease, the property is impressed immediately upon the execution of the deed with the character of personalty, and so much as is undisposed of results to the grantor as personalty. Thus, in *Hewitt* v. *Wright*, 1 Bro. C. C. 86, real estate was limited to the use of the settlor for life, with remainder to trustees, in trust to sell and pay debts and a sum of 2100*l.*, and after payment of their expenses to raise 1500*l.*, and pay the interest to Dorothy Wright, the daughter of the settlor, till she married, and to pay the principal to Dorothy within twelve months after her marriage; and there was a power of revocation. The settlor died without having exercised that power. Then Dorothy died, without ever having been married, and the trust as to the principal sum of 1500*l.* never having taken effect, the question was whether that sum was personal estate and passed by his will. Lord *Thurlow* held that it did. "If," he says, "it goes in the case of a will to the heir, in the case of a deed it must result to the grantor; and though in the case of the will it cannot go to the executor as money, not having been converted, but must descend to the heir, yet he should think that it was personal estate of the heir, and if he were dead would go to his executor; and, if so, where it resulted to the grantor it would be personalty in his hands, and would pass as such. . . . . He could not help thinking, notwithstanding *Emblyn* v. *Freeman* (Prec. Ch. 541), that the trust of the 1500*l.* resulted here in the same manner, that it vested in Wright, the grantor, as personal

estate, and so was disposed of by his will." See also *Van* v. *Barnett*, 19 Ves. 102; *Biggs* v. *Andrews*, 5 Sim. 424; *Griffith* v. *Ricketts*, 7 Hare, 299, 311; *Clarke* v. *Franklin*, 4 K. & J. 257, overruling *Emblyn* v. *Freeman*, Prec. Ch. 541.

Where, however, the whole purpose for which conversion of real property is directed fails from the moment of the delivery of the deed, such property results to the settlor as real estate: *Ripley* v. *Waterworth*, 7 Ves. 435. And see the remarks of *Wood*, V.-C., in *Clarke* v. *Franklin*, 4 K. & J. 265.

Money directed to be laid out in land.]—The principle upon which *Ackroyd* v. *Smithson* was decided, applies also to the converse case of money directed to be laid out in the purchase of real estate, devised to uses which partially fail, as well as those which wholly fail to take effect; for the undisposed-of interest in the money or the estate, if purchased with the money, will result for the benefit of the next of kin of the testator, as personalty (*Head* v. *Godlee*; *Reynolds* v. *Godlee*, Johns. 536, 582), and will not go to the heir-at-law. The case of *Fletcher* v. *Chapman*, 3 Bro. P. C., Toml. ed., 1, and a dictum of Lord *Redesdale's* in *Tregonwell* v. *Sydenham*, 3 Dow, 207, seemed to lay down a contrary doctrine. But Lord *Cottenham*, while Master of the Rolls, in the leading case of *Cogan* v. *Stevens*, 1 Beav. 482 n., reported more fully in the Appendix to Lewin on Trustees, p. 911, 3rd ed., after examining all the authorities upon this subject, which are somewhat conflicting, put an end to the anomaly which previously was supposed to exist in the law of conversion by deciding in favour of the claims of the next of kin. In *Cogan* v. *Stevens*, the testator ordered that 30,000*l.* should be laid out immediately by his executors in the purchase of an estate or estates in the county of Devon or Cornwall, the income of which should belong to his widow during her life, and after her decease to certain persons (all of whom died during the life of his widow, without issue), in tail, with remainder to a charity. The money was not laid out, and the gift to the charity being void under the Statute of Mortmain, it was held by Lord *Cottenham*, that the next of kin, and not the heir-at-law of the testator was entitled to the fund. "The question," said his Lordship, "is simply, whether, when a testator directs money to be invested in land for certain purposes, some of which are lawful and take effect, but others fail and become void, the property so given, after satisfying the lawful purposes, belongs to the next of kin, or to the heir of the testator. . . . . Upon principle, and upon analogy to several well-established rules in equity, it would appear that there

is no doubt as to the proper solution of this question. The only difficulty arises from some few cases, or dicta of the judges, which it is impossible to reconcile with these principles or these rules; and some of the cases proceed from authority so high, that, if not absolutely binding on the Court, they ought at least to make it extremely cautious in pronouncing any judgment inconsistent with them. If a testator devises land for purposes altogether illegal, or which altogether fail, the heir-at-law takes it as undisposed of. If a testator gives personal property for purposes altogether illegal, or which altogether fail, the next of kin takes it, as in the case of an intestacy, as undisposed of. If a testator devises lands for purposes which are in part illegal, or which partially fail, or which require part only of the lands devised, the heir takes so much of the land as is undisposed of, and which was destined for the purpose which by law cannot, or in fact does not take effect, and so much as is not required for the purposes of the will; and this whether the land be actually sold or not. But here, it is said, the analogy between the cases of land and money ceases, and that, if a testator directs money to be laid out in the purchase of land for purposes which are partly illegal, or which partially fail, the next of kin has no such interest in the money as cannot be applied to the purposes of the will; but, if there are purposes legal and feasible which require the investment, the next of kin are excluded. And why are they to be so excluded? The proposition assumes the property in question, that is, a portion of the interest in the property, is not disposed of by the will, and the law gives to the next of kin all the personalty not disposed of. Is it from any incapacity in the next of kin to take property which exists in the form of land? That cannot be . . . An observation was made by Mr. *Pemberton*, at the hearing, which removes much of the difficulty which would otherwise have arisen from the cases, namely, that no authority of an earlier date than *Ackroyd* v. *Smithson* ought to have much weight with me. The force of this observation will be felt on adverting to what Lord *Thurlow* says in deciding that case. He says, 'I used to think, when it was necessary for any purpose of the testator's disposition, to convert the land into money, that the undisposed land would be personalty.' Now this is precisely the argument used as to the conversion of money into land by Mr. *Hodgson;* and here I cannot but observe, that this subject of conversion has given rise to two of the ablest arguments ever addressed to any Court—that by Lord *Eldon*, on the one side, in *Ackroyd* v. *Smithson*, and that by Mr. *Hodgson* on the other, in the present case—an argument which has, since it has been delivered,

been frequently mentioned at the bar in terms of the highest praise, and in which I gladly avail myself of this opportunity to express my entire concurrence. In that argument it was necessarily admitted, if all the purposes of a devise [qu. bequest of money to be converted into land] failed, the whole belongs to the heir-at-law [qu. next of kin]. But it was contended, that if the purposes are to be in part executed, and so that the right to have such an investment of money in land effectually existed in any one, to answer such partial purpose, that the land so purchased, after answering such partial purpose, belongs to the heir. So thought Lord *Thurlow*, as to lands directed to be sold, before the argument in *Ackroyd* v. *Smithson*. No wonder, then, that there should be found, before that time, traces of authority in favour of the heir's claim to money, as there was of the next of kin's claim to land; but the exclusion of the latter is now too well settled to be disputed, and the argument for the heir rests on a supposed difference between the two. But no such difference was supposed to exist before *Ackroyd* v. *Smithson:* why then should it exist now? If there be any substantial difference in principle, let it prevail, but if in principle there be no distinction, is not the decision of *Ackroyd* v. *Smithson*, and the subsequent cases, of higher authority than any decision which may have taken place before the principle was so thoroughly discussed and established as it was in that case? In deciding in favour of the next of kin, I am following the principle of *Ackroyd* v. *Smithson*, and maintaining that uniformity of decision as to the conversion of land into money, and of money into land, which was supposed to exist before that time . . . . The result of the whole authorities, seems to be, that, before *Ackroyd* v. *Smithson*, no distinction was recognised between the doctrine as applicable to a conversion of money into land, or land into money: that, as to both, an opinion prevailed, that when a conversion was necessary, and part of the object failed, the unappropriated proceeds belonged to that representative on whom the law cast that description of property in which such proceeds were found to exist. This, as to land converted into money, was corrected in *Ackroyd* v. *Smithson;* but no case has occurred in which the point has been argued and determined, as to money converted into land. I say argued and determined, because, if determined in *Leslie* v. *The Duke of Devonshire*, 2 Bro. C. C. 187, and *Fletcher* v. *Chapman*, 3 Bro. P. C., Toml. ed., 1, it certainly was not argued; but there are undoubtedly dicta of very eminent judges, since that time, which seem to shew an impression on their mind, that the principle of *Ackroyd* v. *Smithson* was not to be applied to a conversion of money

into land. Those learned judges had not the benefit, which I have had, of hearing the point fully and most ably argued; and having, after the fullest consideration, come to the conclusion that that principle does apply to the present case; and, as I am not bound by any of the authorities to maintain a distinction which was not originally supposed to exist, and which cannot be maintained in reason, and which, therefore, if maintained, would be a reproach to the law as it stands, I feel myself fully justified in preserving the uniformity of the rule, as applicable to the two cases, by deciding against the claim of the plaintiff; and I may be allowed to express some satisfaction in finding I am not compelled by authority to hold that any heir should take, as such, what had no inheritable quality, but was pure personal estate, at the time of the ancestor's death, or that, as devisee, he should take that which was never destined for him, but was in most unquestionable terms given to another." See also *Hereford* v. *Ravenhill*, 1 Beav. 481; *Head* v. *Godlee*, Johns. 536, 583.

Distinction between a charge upon, and an exception from, a devise.]— It may not, perhaps, be out of place here, to notice the distinction that has been taken between the cases where property is devised, charged with the payment of a sum of money, and those cases where there is an exception from the devise. If the original destination of such sums has failed, by lapse or otherwise, the question then arises whether such sums result to the heir-at-law of the testator, or sink into the land for the benefit of the devisee.

If a devise to a particular person or for a particular purpose, be intended by the testator to be an *exception* from the gift to the residuary devisee, the heir takes the benefit of the failure: *Arnold* v. *Chapman*, 1 Ves. 108; *Gravenor* v. *Hallum*, Amb. 643.

Where, on the other hand, it is intended to be a *charge* only upon the estate devised, and not an *exception* from the gift, the devisee will be entitled to the benefit of the failure: *Cooke* v. *The Stationers' Company*, 3 My. & K. 264. Thus, where land is devised *charged* with a sum of money which is given upon a contingency which does not happen, the heir will not be entitled to such sum by way of resulting trust, but it will sink into the land for the benefit of the devisee. For instance, where land is devised to A. charged with a legacy to B., provided B. attain the age of twenty-one, Lord *Eldon*, C., has observed, "There the devise is absolute as to A. unless B. attains the age of twenty-one; if he does, then he is to have the legacy; but his attaining twenty-one is a condition upon which alone he is to have it. And if he does not

attain that age, then the will is to be read as if no such legacy had been given, and the heir-at-law does not come in, because the whole is absolutely given to the devisee:" *Tregonwell* v. *Sydenham*, 3 Dow, 210; but see and consider *Attorney-General* v. *Milner*, 3 Atk. 112; *Croft* v. *Slee*, 4 Ves. 60. So in *Cooke* v. *The Stationers' Company*, 3 My. & K. 266, the testator gave and devised to his executors all his freehold and leasehold estates in trust, that by sale of his personal property, and of so much of his real estates, as might be necessary, they should raise a sufficient sum to purchase 10,700*l.* in the 3*l.* per cent. Consols, and he directed this sum of stock to be apportioned between certain legatees, and, among other objects of his bounty, to charities, and he then gave to his wife the rest and residue of his estate and effects of whatever kind, on condition that all the legacies were paid. The charitable legacies failing so far as they affected the real estate, it was held by Sir *John Leach*, M. R., that as the charitable legacies were to be considered not as an exception from the gift to the testator's wife, but as a charge upon that gift, the wife was entitled to the benefit of the failure of the charitable legacies. See also *Noel* v. *Lord Henley*, 7 Price, 241; *S. C.* Dan. 211, 322, 338.

The same result follows where a legacy charged on devised lands lapses by reason of the death of the legatee in the lifetime of the testator (*Sutcliffe* v. *Cole*, 3 Drew. 185) or is void under the Mortmain Act (*Wright* v. *Rose*, 1 Bro. C. C. 61; *Jackson* v. *Hurlock*, 2 Eden, 263; *Henchman* v. *Attorney-General*, 3 My. & K. 493); or where a testator devises lands, charged with a sum, to be appointed by him, and he either neglects to exercise the power, or exercises it in an illegal manner, for in all these cases the charge sinks into the estate for the benefit of the devisee: *Jackson* v. *Hurlock*, 2 Ed. 263, 274; *Tregonwell* v. *Sydenham*, 3 Dow, 213; *Cooke* v. *The Stationers' Co.*, 3 M. & K. 262; *Tucker* v. *Kayess*, 4 K. & J. 339.

And a devise of an estate after raising a certain sum will be construed to mean no more than the law would attribute to a gift of an estate subject to a charge. In *Re Cooper's Trusts*, 4 De G. Mac. & G. 757, a freehold estate was devised to trustees and their heirs, upon trust within one year after the testator's decease, "to raise, by sale or otherwise," the sum of 2000*l.* and to permit his son to enjoy the estate "after *raising as aforesaid*" for his life, with remainders over. Half of the 2000*l.* was given for the benefit of a daughter of the testator for life, and after her death to her children. The daughter died without having had any children. It was held by the Lords Justices of the Court of Appeal, *dubitante Turner*, L. J.,

showing the decision of Sir *W. Page Wood*, V. C. (23 L. J. Ch. 29 n. 1 W. R. 231), that the 2000*l.* was a charge upon the devised estate and not an exception out of the devise, and therefore, as to the 1000*l.* given to the daughter and her children, upon her death sunk for the benefit of the devisee. "The law," said Lord Justice *Knight Bruce*, "is settled agreeably to reason and good sense, that where landed property is given by will to one set of persons, or according to one set of limitations, but is subjected by the will to a pecuniary *charge* in favour of other interests, and those other interests, given by the will, do not exhaust the entire property in the money, the charge, so far as it is not given away, sinks for the benefit of those to whom the real estate is devised, subject to the charge. That, I apprehend, no one will dispute. But it has been said that this is not such a case, because, in the first place, the real estate in question is given to trustees, in trust within a twelvemonth to raise, by sale or otherwise, 2000*l.* A charge not directed to be paid out of income cannot well be raised but 'by sale or otherwise,' and these words mean no more than the law would attribute to a direction to raise the money by sale or mortgage, or to raise it simply. But reliance is placed upon the words '*after raising:*' it was said that they mean something more than the expression '*subject to.*' It is plain, however, in reason and principle as well as authority, that the expression means no more than a gift of the estate subject to the charge. The testator gives this real estate in effect, subject *to a charge* of 2000*l.*, half of which is given for a purpose that has exhausted that half, and the other half for the benefit of a lady for life, and afterwards of her children. That lady is dead, and has never had a child. It is therefore plain that the devisee of the estate subject to the charge is entitled to the benefit of the moiety of the 2000*l.*, the particular interest created by the will in that moiety having ended." See also *Jackson* v. *Hurlock*, Amb. 487; 2 Eden, 263; *Baker* v. *Hall*, 12 Ves. 497; *Ridgway* v. *Woodhouse*, 7 Beav. 437; *Sutcliffe* v. *Cole*, 3 Drew. 135; *Tucker* v. *Kayess*, 4 K. & J. 339; *Heptinstall* v. *Gott*, 2 J. & H. 449.

Where, moreover, a term is created for a particular purpose, and that purpose has been satisfied, if the instrument by which it was created does not provide for the cesser of the term when that purpose is satisfied, and the term remains without any object to which it is to be applied, the beneficial interest in it being a creature of equity, will be disposed of and moulded according to the interests of all persons having claims upon the inheritance. Hence, where an estate

was devised to the use of trustees for a term of years, for the payment of certain specified debts, and after the expiration or other determination of that term, and *subject* thereto, to uses in strict settlement, upon the payment of the debts, the residue of the term was held to result to the devisees entitled to the estate under the will, and not to the heir-at-law. *Davidson* v. *Foley*, 2 Bro. C. C. 203; *Maundrell* v. *Maundrell*, 10 Ves. 259; *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54; *Marshall* v. *Holloway*, 2 Swanst. 432.

And the construction will be the same if, before the devise in strict settlement, the words "subject thereto," *i.e.*, to the term, are omitted, inasmuch as they will be implied by the Court. Thus in *Sidney* v. *Shelley*, 19 Ves. 352, there was a devise to trustees for ninety-nine years upon the trusts thereinafter expressed; and from and after the expiration or other sooner determination of the said term, to uses in strict settlement, no trust of the term being declared; it was held by Lord *Eldon*, C., it being the apparent intention to devise immediate estates, subject to the term, and not future estates expectant on its determination, that there was no resulting trust of the beneficial interest in the term for the heir-at-law, but that it ought to be assigned to a trustee for the devisees under the will. *S. C.* nom. *Sidney* v. *Miller*, Geo. Coop. 206.

Where a testator charges a sum of money upon a devised estate, and in consequence of the failure of the objects for which it was given the sum sinks for the benefit of the devisees, they will take it as real estate. Thus, in *Re Cooper's Trusts*, 4 De G. Mac. & G. 757, a testator devised a freehold estate, in such terms as made a sum of 2000*l.* a *charge*, as distinguished from an exception, upon the devise he afterwards made, and he devised the estate to his son Philip for life, with remainder in the events which happened to his sons Simeon and Thomas, as tenants in common in fee. The trusts declared of one half of the 2000*l.* were for a daughter of the testator for her life, and, after her death, for her children. Simeon and Thomas died in the life of Philip, who kept down the interest of the sum of 2000*l.* After the death of Philip the trustees raised the 2000*l.*, and subsequently the testator's daughter died without ever having had a child. It was held by the Court of Appeal in Chancery, affirming the decision of Sir *W. Page Wood*, V. C. (reported 23 L. J. N. S. Ch. 29 n., 1 W. R. 231), that the 2000*l.* formed part of the real estate of Simeon and Thomas at their decease. "This point," observed Lord Justice *Knight Bruce*, "was raised,—it was said that as this sum might

have been, and, as it was contended, ought to have been raised, in the lifetime of the devisees, Simeon and Thomas, it is to have been taken as having been so raised, and is therefore personalty in the devisees. Now, perhaps, a sufficient answer is afforded to this suggestion by the circumstance that, in point of fact, no sale or conversion did take place till after the deaths of the devisees, Simeon and Thomas, as to whom alone it is material to consider the question. But, although it is probable that this part of the case might be so disposed of, I am inclined to put it on much more general ground. I am of opinion, making the supposition most beneficial to the appellants,—that is, supposing the money to have been raised by means of a sale during the lives of Philip and Simeon and Thomas, —that it was the right of any person interested in the estate (the title of the testator's daughter being removed out of the way), to have it re-invested in real estate, to give it the actual character as well as the assumed character of realty. Therefore, if the daughter had died, leaving Philip, leaving Simeon, and leaving Thomas surviving, it would have become the right of Philip to insist (if he had chosen) that this money should be invested in real estate, which character had only been taken from it at the outset for a purpose that had partially failed of effect or ended. In every possible view of the case, it appears that this must be treated as part of the devised real estate."

Where a testator appoints by his will an already existent charge on an estate, upon a partial failure of the purposes for which it was given, it will not to the extent of such failure sink into the estate. *Simmons* v. *Pitt*, 8 L. R. Ch. App. 978.

Where real property is devised upon condition to transfer a part to a charity, the condition in favour of the charity being void under the Mortmain Act, the devisee will be entitled to the whole of the property discharged of the condition. *Poor* v. *Mial*, 6 Madd. 32; and see *Henchman* v. *The Attorney-General*, 3 My. & K. 485.

When a residuary devise or bequest comprehends property which would otherwise have resulted to the heir or next of kin.]—In the cases we have before considered, the competition has been between the heir-at-law and the next of kin, where there has been a resulting trust for one of them; but whatever may result to either the heir-at-law or next of kin, may, by appropriate words, be given to others; for instance, if in the principal case the testator had directed that if any of the legacies should fail, by reason of lapse or otherwise, the same should be

paid to a particular person, it is clear that he would be entitled to such of the legacies as failed by lapse or otherwise. Difficulties however have often arisen in determining between the conflicting claims of the heir-at-law and the residuary legatee or devisee, whether that which has wholly or partially failed to take effect in favour of those for whom it was originally destined, was intended by the testator to be comprised in such an event, in a residuary bequest or devise.

First, with regard to that class of cases in which the competition has been between the heir-at-law and the *residuary legatee;* viz., when the question arises whether the direction to convert realty into personalty is not so absolute as to pass the realty directed to be converted under a general residuary bequest of personalty. It seems, however, clear upon the principles laid down in the cases before examined, that a mere direction to sell land for a particular purpose is not considered such an indication of a testator's intention to convert real into personal property, to all intents, so that the undisposed-of proceeds should pass under a residuary bequest of personalty. Thus, in *Maugham* v. *Mason,* 1 V. & B. 410, a testator devised freehold chambers to trustees and their heirs, upon trust to sell, and to apply the money arising by such sale towards payment of legacies, and the rents, until sold, to be applied to the same uses; and, after giving some pecuniary and specific legacies, as to the rest, residue, and remainder of his personal estate, after payment of his debts, legacies, and funeral expenses, he bequeathed the same to his trustees, their executors, administrators, and assigns, upon trust to convert all the said residue into ready money, and to lay out the same in the purchase of freehold property, to be settled as therein mentioned. The executors paid all the debts, funeral expenses, and legacies, out of the personal estate, not making sale of the real estate. Sir *W. Grant,* M. R., held, that the real estate, after payment of legacies, which were a primary charge upon the personalty, resulted to the heir-at-law, and did not pass under the residuary bequest. "The observation," said his Honor, "is perhaps minute, that the money, produced by the sale of the real estate, could not with propriety be spoken of as personal property to be converted into money; at most, however, this is a general bequest of the residue of his personal estate; and the question is, what was meant to be included under that description. Properly speaking, nothing is the personal estate of a testator that was not so at his death. He may certainly so express himself as to show that something else was intended; but where there is nothing but a direction to sell land, with application of the

money to a particular purpose, and a subsequent bequest of the rest and residue of the personal estate, I know of no case in which it has been held that the surplus, after the particular purpose is answered, forms part of the personal estate, so as to pass by the residuary bequest. The mere disposition of the residue of personal estate can never solve the question, what is personal estate. The clause may be so conceived as to show the sense in which those words are used; but here is nothing more than those words, unaccompanied with anything explanatory of the sense in which they were used." See also, *Wilson* v. *Major*, 11 Ves. 205; *Berry* v. *Usher*, 11 Ves. 87; *Gibbs* v. *Rumsey*, 2 V. & B. 294; *Kellet* v. *Kellet*, 3 Dow 248; *Dixon* v. *Dawson*, 2 S. & S. 327; *Collis* v. *Robins*, 1 De G. & Sm. 131; *Hamilton* v. *Foot*, 6 I. R. Eq. 572; *Watson* v. *Arundel*, 10 I. R. E. 299.

Where, however, a testator expressly declares, that the money arising from the sale of real estate shall be considered as part of the personalty, it will pass under a general residuary bequest of personalty in the same will (*Kidney* v. *Coussmaker*, 1 Ves. jun. 436; *Collins* v. *Wakeman*, 2 Ves. jun. 683; *Robinson* v. *The Governors of the London Hospital*, 10 Hare, 19, 27), and it is liable to the trusts which attach to such residuary personal estate, and to the legal incidents affecting it: *Bright* v. *Larcher*, 3 De G. & Jo. 156; *Field* v. *Pickett*, 29 Beav. 568.

So, also, the intention that the proceeds of the sale of real estate should pass under a residuary bequest of personal estate, may be inferred from expressions in the will irresistibly leading to such a conclusion; and the blending of the real with the personal estate has been considered as furnishing an indication of such intention: *Byam* v. *Munton*, 1 Russ. & My. 503; *Mallabar* v. *Mallabar*, Cas. temp. Talb. 78; *Kellet* v. *Kellet*, 3 Dow 248; *Brown* v. *Bigg*, 7 Ves. 280; *Griffiths* v. *Pruen*, 11 Sim. 202; *Bromley* v. *Wright*, 7 Hare 334; *Spencer* v. *Wilson*, 16 L. R. Eq. 501, 506; *Court* v. *Buckland*, 1 Ch. D. 605; *Watson* v. *Arundell*, 11 I. R. Eq. 53.

The next class of cases to be examined is that in which the competition lies between the heir-at-law and the *residuary devisee*. And here it must be remembered, that although it has always been held that a will as to personalty speaks, at *the time of death of the testator*, and the residuary legatee therefore takes not only what is undisposed of by the expressions of the will, but that which becomes undisposed of at the death, by disappointment of the intentions of the will; yet previous to the Wills Act (1 Vict. c. 26) it was otherwise as to the residuary devisee of real estate, or of the price of real estate. As to him, the will spoke only *at the*

time of making it, and he could take nothing but what was at that time intended for him.

Thus, in a case previous to the Wills Act, where a sum was expressly excepted out of the produce of real estate devised to be sold, and was not disposed of, it is clear that it belonged to the heir-at-law, and not to the residuary devisee : see *Collins* v. *Wakeman*, 2 Ves. jun. 683.

Upon the same principle, under the old law (although the authorities are somewhat conflicting), the better opinion seems to be, that where part of the produce arising from land devised to be sold, is directed to be applied to purposes which fail, either by lapse or on account of illegality, the heir-at-law, and not the residuary devisee *of the produce*, will be entitled to the benefit of the failure. Thus, in *Jones* v. *Mitchell*, 1 S. & S. 290, the testatrix by will gave 800*l.* out of the money to be produced by the sale of her real estates, to trustees, for the benefit of certain charitable institutions ; and she gave the residue of the money to J. R. The gift of the 800*l.* being void, Sir *J. Leach*, V. C., held that the heir of the testatrix, and not J. R., was entitled to it. "The devisor," said his Honor, "at the time of making the will, intended that the residuary devisee of the price of the land should take such residue, subject to the deduction of the 800*l.*, and not the 800*l.*, which is therefore undisposed of, and results to the heir." See, also, *Hutcheson* v. *Hammond*, 3 Bro. C. C. 128; *Collins* v. *Wakeman*, 2 Ves. jun. 683 ; *Gibbs* v. *Ramsey*, 2 V. & B. 294 ; sed vide contra, *Page* v. *Leapingwell*, 18 Ves. 463 ; *Noel* v. *Lord Henley*, 7 Price 240 ; *S. C.*, 1 Dan. 211, 322.

The fact, however, of the testator having blended the produce of his real with his personal estate, has in many cases been considered a sufficient reason for excluding the heir, in favour of the residuary legatee, of the produce of the real and personal estate, by applying to the mixed fund the rule applicable to personalty, such rule being, even under the old law, as laid down by *Sir John Leach* in *Jones* v. *Mitchell*, 1 S. & S. 290, that the residuary legatee of personalty takes what is not effectually disposed of. See *Durour* v. *Motteux*, 1 Ves. 320 ; 1 S. & S. 292, n., the dictum of Lord *Thurlow* in *Hutcheson* v. *Hammond*, 3 Bro. C. C. 148 ; *Kennel* v. *Abbot*, 4 Ves. 802 ; *Amphlett* v. *Parke*, 1 Sim. 275 ; 4 Russ. 75, per Sir *John Leach* ; *Green* v. *Jackson*, 5 Russ. 35 ; *S. C.*, 2 Russ. & My. 238 ; *Cooke* v. *The Stationers' Company*, 3 My. & K. 262.

A fortiori where the real property is directed to be sold, and the proceeds arising therefrom, and from the personal estate, are directed to be applied to certain purposes, and the surplus is given away from the heir, there will be no resulting trust in his favour :

Norreys v. *Frank*, 9 I. R. Eq. 18.

The cases, however, of *Collins* v. *Wakeman*, 2 Ves. jun. 683; *Gibbs* v. *Ramsey*, 2 V. & B. 294, and *Amphlett* v. *Parke*, 2 Russ. & My. 221 (overruling the decision of Sir *John Leach* in that case), decide that, although real and personal estate are blended together, a residuary devise or bequest of the proceeds to arise from the sale of the real and personal estate, will not carry to the residuary devisee or legatee of such proceeds, lapsed or void legacies, arising from the sale of the real estate, for such lapsed or void legacies, so far as they arise from the sale of the real estate, will result to the heir-at-law. In the case of *Amphlett* v. *Parke*, 2 Russ. & My. 221, a leading authority upon this subject, a testatrix gave her real estates upon trust to be sold, and directed the monies to arise from such sale, to be considered and taken as part of her personal estate; she then directed, that, out of the monies to arise from such sale, and out of all other her personal estate, certain pecuniary legacies should be paid; and bequeathed all the residue of her personal estate, and of the monies arising from the sale of her real estates, upon trust for two persons and their children. Some of the pecuniary legatees having died in the testatrix's lifetime, it was held by Lord *Brougham* (reversing the decision of Sir *John Leach*), that the conversion of the real estate into personal, directed by the will was not absolute, but partial only, for the purpose of making good the pecuniary legacies, and that such of those legacies as had lapsed, in so far as they were payable out of the produce of real estate, had lapsed for the benefit of the heir-at-law. Lord *Brougham*, in his learned judgment in this case, thus ably sums up the doctrine applicable to this class of cases: "The rule," observes his Lordship, "which I have stated to be extracted from all the cases is, that you must clearly prove that the heir-at-law is excluded; that the words prevent the possibility of considering anything to be left as a resulting trust for him; and that the burthen of such proof lies upon those who claim in opposition to him. It is not at all inconsistent with that rule, but rather flows from it, and I agree in holding, that a testator may provide, not only that the undisposed residue, which is strictly personal, shall go to the residuary legatee, but that all lapsed legacies, of whatever nature, shall also go to him; and that, if it is clear, therefore, from express words, that he gave him the lapsed legacies that were to be raised by the sale of real property, and failed in consequence of lapse, mortmain, or any other cause; if, he says, for instance, 'I give all the lapsed legacies as parcel of my residue, to the residuary legatee,' cadit quæstio;

there is no doubt he may; and if he can do it by express words, he can do it by plain and obvious intention to be gathered from the whole instrument. If you once arrive at the conclusion, that the testator has displaced the heir, then, of course, the lapsed fund falls into the residue by express intention." See, also, *Salt* v. *Chattaway*, 3 Beav. 576; *Taylor* v. *Taylor*, 3 De G. Mac. & G. 190.

As to wills coming within the operation of the new Wills Act, (1 Vict. c. 26,) it must be remembered that the 25th section enacts, "that unless a contrary intention shall appear by the will, such real estate or interest therein, as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail, or be void, by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will." See *Carter* v. *Haswell*, 3 Jur. N. S. 788.

By the same act, moreover, it is enacted that devises or bequests to a child or other issue of the testator who shall die leaving issue living at the testator's death shall not lapse. See sect. 33.

WARD *v.* TURNER.

July 20th 1752.

[REPORTED 2 VES. 431.]

DONATIO MORTIS CAUSÂ.]—*Delivery necessary to donations mortis causâ; but the delivery of receipts for South-Sea Annuities is not sufficient, though strong evidence of the intent.* S. C., 1 Dick. 170.

THE end of the bill was to have a transfer of 600*l.* New South-Sea Annuities made to the plaintiff, as executor of John Mosely, and to have certain specific parts of the personal estate of William Fly, dead, intestate, delivered or made over to the plaintiff. Another prayer of the bill was to have an account of what was due to Mosely for services performed to Fly, against whose estate this demand was made.

The case the plaintiff made was this: he was executor of Mosely, who was related to Fly by affinity, having married his aunt; that Fly had great obligations to Mosely, who took care of him in his infancy; and at his house Fly used to come from school when it broke up: and afterwards, Mosely, who, in the latter part of his life, appeared to be in very mean circumstances, lived with Fly as his servant, until Fly's death, had his victuals there, performed services to him, and had now and then a shilling given him. From thence Fly made profession of a strong intent to do for him at his death, and had great kindness for him; in pursuance of which, as Fly drew near his end, being in a very bad state of health, during that time he made Mosely several donations mortis causâ, in prospect of death. Four times were fixed on by the witnesses, of which several were examined in the cause, speaking of actual gifts, and declarations sup-

porting them. First, 18th January, 1746, which was spoken to by the porter of Furnival's Inn. The second, 6th February, 1746, which was the principal proof relied on by the plaintiff to support the gifts of these annuities, and was proved by Fly's barber, who, being sent for by Fly, found Mosely with him, and no other, and swore to the particular words used, and declarations made: that Fly said to him, viz.: "I intended to give him (speaking of Mosely) Longford estate for his life: but I have considered of it; and that which is worth 40*l.* a year to another, is not worth so much to him; for if the tenants wanted an abatement for repairs, he would allow it; and, therefore, I will do better for him." That thereupon Fly went to his escritoire, and, taking three papers, said, "I give you, Mosely, these papers, which are receipts for South-Sea Annuities, and will serve you after I am dead." The third, 23rd February, which was proved by one who swore that in his presence Fly said, "Mosely, I give you all the goods and plate in this house." Fourthly, 3rd March, by the said barber, who swore that Fly declared to him, and to another person, who only were present, that he gave to Mosely all his household goods, money, arrears of rent, and everything that should be found in his house, except his sword, gun, and books, and that this, together with those three receipts, would make 2000*l.*: that he wished a gentleman of his acquaintance had his sword and gun, but all the rest he gave to Mosely. He died in April following.

Argument for the plaintiff.

These were argued to be so many declarations of bounty, supported by so many witnesses at different times. Two questions arose: first, Whether in fact, these things were given? secondly, Whether properly given in point of law? Donations mortis causâ are derived from the civil law. Justinian's Inst., lib. 2, tit. 7, shows the nature of them; and that, in general, anything is properly the subject matter of such donations, that may be the subject matter of a legacy or donation inter vivos. Either rights in possession or reversion are capable of

being so given. It is not necessary that the donor should have a legal interest; an equity will do, when by no act he can pass the legal property: consequently the formalities accompanying such donation must be according to the subject of the gift. Livery, then, cannot be always necessary, as, in a chose in action or simple contract debt, which lie not in livery, choses in action were not assignable, but now are in this Court as much as things in possession, by the rules of law; and, therefore, this Court will carry into execution a voluntary gift of a chose in action. In *Lawson* v. *Lawson*, 1 P. Wms. 441, such a gift of a note drawn on a goldsmith, which in point of law passed nothing, was held good; *Jones* v. *Selby*, Prec. Ch. 300; *Gold* v. *Rutland*, 1 Eq. Ca. Ab. 347. In *Snellgrove* v. *Baily*, March 11, 1744 (*a*), Mrs. Baily, going out of town in a bad state of health, gave her maid a bond, executed to her by a third person, saying, "If I die, it is yours." She died intestate; the plaintiff was her administrator: thus it stood in the defendant's answer. A bill being brought for discovery and delivery of the effects of the intestate in the hands of the defendant, the question was, whether the nature of the property was capable of being so given? His lordship held, it might, as well as a specific chattel; though no legal property passed thereby, nothing but the paper, a bond being evidence of a debt, and the intent being to give the debt, not the paper, the Court held it a good donation mortis causâ, comparing it to the property which passes by assignment of a bond, which passes nothing in point of law, and the assignee must make use of the other's name for recovery on it. That case rested singly on the averment in the answer; in this is strong evidence. The Court there put this case: that, if a chattel in possession had been bought by the intestate, and a bill of sale made to a trustee, for her use, the property would have been in the trustee, and the equitable interest in the cestui que trust, who, if she had given this chattel so circumstanced to the defendant, it would have been good. [*Lord Chancellor* (*b*.)—That is a case put upon an equitable interest. There the chattel

(*a*) 3 Atk. 214; Ridg. Ca. t. Hard. 202.

(*b*) *Hardwicke.*

itself must have peen delivered.] Though these donations differ in some respects from testamentary dispositions, yet they participate in a great degree ; for like that, it is a declaration of his mind, what he will have done with his property when he is no more ; he does not part with the property, or even the use of the thing, in his life : for that would prevent any such disposition from being ever made. Where the thing lies in livery, the livery is not made to complete, it is only evidence of the gift ; and if, the moment after possession delivered (with a declaration that he intended, if he died, it should be the donee's, absolutely), the thing was restored by the donee, that would not tend to defeat the gift. [*Lord Chancellor.*— I apprehend it would : and that such an instantaneous gift and taking back would not do, which it would be dangerous to admit.] But, where livery cannot be, the best evidence the nature of the transaction will admit of, being only to show the mind of the donor, will do. Here is such a delivery over, as is sufficient evidence of the gift of these annuities. They certainly lie not in livery, there being other ways of passing them. There is no evidence of them but one's name being placed in the book. The delivery, then, with strong words of gift of these receipts, which were the only symbol of his property, was as much as he could possibly do towards giving it, except a mere transfer in the books, which was not necessary, nor could he conveniently do that : and it was giving with a prospect of not recovering of that particular illness, for that of itself would be a revocation ; but he died of it, and within two months of the gift. In cases of livery of seisin it is not necessary to deliver the thing itself, or any part ; for, coming upon the land, and delivering a gold ring thereon, is enough (1 Inst. 44), though not participating of land ; but there ought to be clear proof of the intent, which there is here. Next as to the specific things, it is said, there was not sufficient possession delivered ; but in such a number of things, it is not necessary every one should be delivered. The subject of the gift is what was then in the house. If a

delivery is absolutely necessary, the plaintiff has not indeed proved it; but Mosely was actually in the house with him, and was then as much in possession as if actually delivered to him, which is not necessary if he is in possession. If one is recited to be in possession of a house, livery is not necessary. If one does as much as he can towards possession, it is all that is required; as delivery of the key of a warehouse; so of a piece of parchment, delivery of a ship and of the actual possession of it to the mortgagee, as determined by your Lordship in *Brown* v. *Williams* (1 Atk. 160). No more could be done here; for he could not carry the goods out of the house: and he was then in possession. However, as this is a bill for discovery of assets, if the plaintiff is not entitled to these gifts, he is at least to a reasonable satisfaction for his services.

Argument for the defendant.

On the part of the defendant, administrator of Fly, there was no evidence to impeach the evidence of the gift, but to invalidate it to a certain degree, principally from the behaviour of Mosely after the death of Fly, as not like one who thought he had a right to these donations from him: for it was sworn, that being at the house of Fly at his death, he continued there until Midsummer; he did not say these goods were his own, upon application made to buy them, but that they were Turner's, the administrator, and next of kin; sent to Turner desiring him to take them away; and they were sent away, and Mosely assisted in packing them up, and declared he would not go into mourning, for that Fly had given him nothing that he could help. A donation mortis causâ (though there is, indeed, such a thing in the law) is of a very delicate nature, and, from its import, merely voluntary. [*Lord Chancellor.*—Such donations are subject to debts.] If there is no distinction between testamentary dispositions and such a donation, and there is a former will, the Statute of Frauds will be overturned, which relates to all wills of personal estate; therefore, since the statute, no nuncupative will or codicil can be set up where a will was made before. This statute has expressed an anxiety

as to nuncupative wills, not taking them away absolutely for fear of breaking in upon the real intent, but, seeing them liable to uncertainty, litigation, and perjury, has put several restrictions on them; whereas, if the said distinction is not observed, a nuncupative will may take place, proved at any time, and that by a single witness, where more than one would not be ventured, for fear of contradiction, and that at any distance of time, nor confined to 30*l.*, as the statute required. A testamentary disposition is a gift in case of, and only has operation after, death. A donation, then, cannot be in general in case of death, but must have something peculiar, differing from legacies. The characteristic of it is this:—It is not on a general apprehension of approaching mortality, but where the particular recovery of the donor is annexed by way of defeasance to the gift, which would be otherwise absolute. It may be confined to an immediate illness; but the Roman law puts the case of a man's going a journey, which was formerly more hazardous than now; so, if going to battle, and in case he is killed, and makes that gift; so, if under a bad state of health, he makes a complete gift, if he does not recover; that must mean some circumscribed time or illness, and there must be some sort of defeasance, arising from the recovery or return home, to these donations, otherwise it is an absolute gift. But, though liable to be defeasanced, it must be a complete gift before inter vivos; and that is the reason the Ecclesiastical Court has no probate or jurisdiction over it, as it would if testamentary. Next, to consider what is meant by delivery, in the Roman and civil law books, as far as admitted in this country; for, as it is in all the books, it will not hold here. Where delivery is necessary to make that complete inter vivos, if a man said, "I give it," and there is no delivery, it would be nudum pactum: there could be no title or action. Then delivery is there put only to show that the gift must be complete. In that new species of property the actual delivery is supplied by that which is equivalent to delivery; as in case of a ship, delivered by bill of sale, which is defeasanced in case of

recovery; that is enough; but it must be complete according to the nature of the thing, otherwise it cannot be distinguished from a legacy. A delivery is necessary, according to Swinburne, in each of three instances he puts, of a donation mortis causâ. *Lawson* v. *Lawson* (*a*) turned upon it, and could not be admitted but on that foundation. There cannot, indeed, be such a donation by parol, of a book or simple contract debt, or of arrears of rent, because there can be no delivery, and no inconvenience, because it may be easily done another way. Taking it in case of a specific thing, as a horse, &c., possession is altered (as Swinburne supposes), and then the donee shall enjoy it; otherwise there is no difference between this and a testamentary disposition. This donation, therefore, takes effect; but still liable to that contingency. There is no case that the donor must keep possession in his life; how, then, can he have the use or benefit of it, taking it to be a specific thing? As to a chose in action being allowed to be given, that was a new case before your Lordship; for *Snellgrove* v. *Baily* (*b*), which was of a bond was the first ever determined upon anything of a chose in action. The reason the Court went on there was, that it was as complete a gift as could be made of a bond; for, writing not being necessary to the assignment of a bond, if all was delivered that could be, all that was required was done. It was a substantial gift of the paper and seal, without which there could be no recovery on it. A bond carries the debt itself, not only evidence or security of it, therefore is considered as bona notabilia, and not only where the party dies, like other choses in action; and a court of equity does not say, a bond must be delivered by deed in writing. In *Richards* v. *Syms* (*c*), on a gift of a mortgage to the mortgagor, by giving him the deeds, your Lordship held, that if that fact was proved, it was a gift of all the money on the securities, and not within the Statute of Frauds. So that the bond there is as completely given as can be, supposing that parol evidence is sufficient, and writing not necessary. If that was not the ground of that determination,

(*a*) 1 P. Wms. 441.

(*b*) 3 Atk. 214.

(*c*) Barnard. Ch. Rep. 90.

and no delivery requisite, but that it is to remain with the donor until his death, and only a formal delivery, it will not differ from the inconveniences intended to be guarded against by the Statute of Frauds; for then every loose declaration will be set up, notwithstanding solemn wills before executed. It is dangerous to support parol declarations upon gifts of this kind, not accompanied with a visible act to give notice to all the world, as delivery. And the statute has thought it better, that some of these true gifts should fail (as has frequently happened for want of the solemnities thereby required), than there should be a public inconvenience. If a common chose in action cannot be delivered, how can this, which is stronger, as it is capable of being assigned by a proper transfer? If, indeed, one goes as far as he can, the Court will perhaps supply it; as in those cases on the stat. Jac. 1, in *Ryall* v. *Rowles* (*a*); but that is not the case here. Fly was a man of business, an attorney, yet waits near two months without doing that which would effectuate it. That argument of the testator's having time to make a perfect gift, is often used in Doctors' Commons on imperfect wills. This Court will never support that as a donation, which may be a gift by will; for there must be a difference between them.

(*a*) 1 Ves. 348.

Lord Chancellor Hardwicke, in the outset, laid the other goods out of the case, of which there was no pretence of any delivery, which would be very dangerous; and that it was impossible to make such a complex donation mortis causâ, as a general bequest of all one's personal estate, or of a residue, without some proof of delivery; for that would be the same as a nuncupative will: and it was a pity the Statute of Frauds did not set aside all these kinds of gifts. But what weighed with him was, whether the stock without delivery was a good donation mortis causâ; which question, considering the vast proportion of property in such funds, was of infinitely greater consequence than the value of it: therefore he should not determine it hastily. If courts of justice were compellable by rules of law to suffer such gifts

without any transfer, to prevail, it could not be helped; but then the Statute of Frauds relative to nuncupative wills would be so far nugatory and vain.

Having taken time to consider, his Lordship now delivered his opinion.

Lord Chancellor Hardwicke.—There are two general questions. What is the weight and strength of the evidence in point of fact? Next, the result of that evidence in point of law, or the law arising on this fact?

As to the first, and as to the conviction arising therefrom, there is, to be sure, very strong evidence on the part of the plaintiff, of Fly's general intention of bounty, which is not to be disputed; but as to the evidence of the particular gifts, I cannot help taking notice, that the declarations relied on by the plaintiff to prove them, are all made to persons of extreme low degree, his porter, barber, &c. It is observable, also, that Fly was bred an attorney: had some property; some real estate; was a man of business; and must be presumed, from his profession and education, to know something of what the law required to make a will; and certainly it would be more easy for him to have made a will in writing, than to have taken all these several steps, to give away these parts of his estate. It is likewise observable, that the behaviour of Mosely, and his declarations after the death of Fly, are some impeachment and weakening of the plaintiff's evidence; for it is extraordinary, that, if he thought himself entitled, he should not insist upon these goods being his own, instead of suffering them to be taken away, and assisting therein. At the same time, if I was to ground my opinion upon any objection to the evidence in point of fact, I should not determine it, but send it to be tried; for this is as proper a case to be tried as any other.

It is not insisted upon by the plaintiff as a testamentary cause; for if he was to insist on that, it would overturn his demand, as he has no probate; but it is insisted on as a donation mortis causâ. Trover might be brought for it;

for it would transfer the property: but though I have searched for it, I do not find a case of that kind in the books, of such an action at law: but it might be tried at law, was there a foundation for it; and if I was to ground my opinion upon the evidence in point of fact, I would direct a trial.

But, according to my opinion, there is no reason to give the parties that trouble: for next, supposing the fact well proved, the consideration is the result in point of law.

The relief sought, is founded upon these gifts being good donations mortis causâ.

First, as to any specific parts (if they may be so called), except the annuities. They are clearly not good, (as I declared at the hearing,) there being no pretence of any delivery in any shape whatever. They are so general, as, in my opinion, if they prove anything, to prove an intent to make a nuncupative will of all his personal estate, (this is exclusive of annuities,) saying, "Mosely, I give you all the plate and goods in this house," or, "If I die, all are yours;" but nothing was delivered. It is said, he had possession by living in the house, and did not want delivery, but he lived as a servant, who had no possession; so that, if a servant had them in custody, it would be a possession for his master. The other declarations are not only of the goods, but of all money and arrears of rent, and extend almost to everything; consequently, there are no grounds to carry it so far: and it is impossible to support any of these gifts in prospect of death, as I have declared already.

Next, as to the gift of this annuity. If the witnesses deserve credit, it is strong evidence of a general intent of bounty; but it rather turns against the plaintiff, for it shows a general intent to give the whole to Mosely, by making a nuncupative will or wills at different times. If that was to be admitted to support these several gifts as so many donations mortis causâ, it would overturn not only the letter but the whole spirit and intent of the Statute of Frauds. But, notwithstanding, suppose this

gift of the annuities was just, as if it was a distinct and independent donation from the other matters insisted on as gifts, the question is, whether it is such a gift as the law of England allows, as a donation mortis causâ? First, The fact of the gift is proved only by one witness: whereas the civil law, from which this doctrine is taken, requires five witnesses thereto; for Justinian, when he allowed these gifts, was apprehensive of fraud arising from them, and takes notice in that very chapter relied on for the plaintiff, that he had made a constitution to regulate it, that it should be in the presence of five, limited in point of value, &c., which shows how jealous he was of it. Besides, the witness swears to this in very formal words; and, though it is pretty hard to object to a witness as loose and uncertain on one hand, and the contrary on the other, yet this argues either a very strong memory or a pretty strong assurance in swearing. But the express gift, as he swears, is only of the three receipts. That is the form of the gift. Taking it, therefore, according to the substance of the gift, that this amounted to a declaration that Fly, by giving these receipts, intended to give the annuities, upon this the principal point arises, whether delivery of the thing given by way of donation mortis causâ is necessary: and, if necessary, whether this delivery of the receipts is sufficient delivery of the thing given by way of donation mortis causâ? I am of opinion, that delivery is necessary to make good such a gift, and that the delivery of these receipts for the consideration-money of the purchase of them was no sufficient delivery to validate this act. To clear this, it is proper to consider the notion of a donation mortis causâ, according to the civil and Roman law, and the law of England.

According to the civil and Roman law there is a great variety, and several passages therein are pretty difficult to reconcile. Digest, lib. 39, tit. 6, Law 38, requires, that both donor and donee should be present at the time of the gift, "quo præsens præsenti dat;" which looks as if delivery was intended at the time. It is "quo" there, and in several editions: but in the Lyons edition of Gotho-

fredus' Corpus, it is "quod;" which makes it sense. Next, in Digest, same tit. parag. 1, it speaks of it throughout as a restoring of the same thing, if the donor should recover: as if a restitution was to be. It is proper to take notice, that in the Roman law there were *three* kinds of donations mortis causâ. And in Voet on the Pandect, lib. 39, tit. 6, parag. 3, in his 2nd vol. p. 710, the division is agreeable to that made of these donations by Swinburne. The first is a donation by one in no present danger, but in consideration of mortality if he died; and this is strictly compared to a legacy; for the property was to pass at the death, not at the time. The second kind is, where the property passed at the time, defeasible in case of an escape from that danger in view, or of recovery from that illness. The third was, where, though he was moved with the danger, yet not thinking it so immediate as to vest the property immediately in the person, but put in possession of the person as an inchoate gift, to take effect in case he should die. Vinius's Comment. on this place of Justinian is more particular—puts the remedy by action the donor might have, in case he repented or revoked. That is, on the last kind of donation mortis causâ, where he did not part with the property immediately, he should have a real action; but where he actually parted with the property, but the gift was to be defeated by his revocation or recovery, or escape from that danger he was in, conditionem habeat (which is a personal action) to make the irritancy, or to recover damages for the thing: so that it differed not but in the nature of the action. And in Calvin's Lexicon, &c., that is the distinction. Swinburne, on the text I have quoted implies there should be a delivery; saying, that legacies differ from such donations, for, that legacies are not delivered by the testator, but to be paid or delivered by the administrator; putting the distinction upon the one being delivered in life, the other after death. But, notwithstanding this, several books in the civil law import the contrary; particularly Vinius, in his Comment., lib. 2, tit. 7, sec. 1, numero 2; Covarruvias, vol. 1, rub. 3, and

Voet on the Pandect, same chapter, num. 3 and num. 6, which passages show the different expression and opinions, some importing a delivery, others not. I have mentioned them to come at that which seems the distinction, reconciling them all, according to what is laid down by Voet, num. 6, that they did not require an absolute delivery of possession to the first or third kind of gift I have mentioned; but, in the other case, where the property was to pass immediately, it was required; which is the meaning of the expression in Voet, "in mortis causâ donatione dominium non transit sine traditione," and of that other expression in Voet. With this distinction, those passages in the civil law are properly reconciled.

Though I know these donations mortis causâ could never come directly in question in the Ecclesiastical Court, they might collaterally; and on these two heads I inquired whether there have been any cases there upon this, viz., in suits against an administrator on account of assets by the next of kin, where the administrator had insisted he could not administer such a part, because it was given mortis causâ; or, if there is a will, in which there are specific legacies, and one of those legacies he had given in his life by way of donation mortis causâ, there it might come in question in the Ecclesiastical Court; but I cannot find it has. The nearest case to it is *Ousley* v. *Carrol* (*a*), June, 1722, in the Prerogative Court, before Dr. *Betteswortb*. There was left a writing in the presence of three witnesses, not in the form of a will but a deed, viz.: "I have given and granted, and give and grant, to my five sisters, and children of the sixth, their heirs, executors, and administrators, in case they survive me, all my goods and chattels, and real and personal estate, and all which I may claim in right of my own, whether alive or dead." The dispute was by a person claiming as his wife, and who had been so, but divorced, who insisted this was no will, but a deed of gift mortis causâ (and a gift mortis causâ may be made in writing as well as otherwise, and so it might by the

(*a*) See *Thorold* v. *Thorold*, 1 Phillim. 1; *Attorney-General* v. *Jones*, 3 Price, 368.

Roman and civil law); but the Ecclesiastical Judge was of an opinion this was testamentary, proved it as such, as a testamentary act, and probate was granted, from which there was no appeal; but a case was there cited of *Shargold* v. *Shargold*, upon a deed of gift by Dr. Pope, not to take place until his death, and sixpence delivered, by way of symbol, to put the grantee in possession: that was pronounced for as a will, not as a donation mortis causâ; which I mention to show how far the Ecclesiastical Court has considered these things as testamentary.

Having considered these donations, the different species, and how far delivery is necessary by the Roman and civil law, I will consider it according to the law of England. They are undoubtedly taken from the civil law; but not to be allowed of here farther than the civil law on that head has been received and allowed. Taking the law of England to consist (as Hob. says) of rules of law and equity, it might have come in question in cases of action of trover and detinue; but I have never found any action on that head. Consider it, therefore, as in this Court, the civil law not binding here, but as far as received and allowed; which must be from adjudged cases and authorities, proving that the civil law has been received in England, in respect of such donations, only so far as attended with delivery, or what the civil law calls tradition, for which see Swinburne (who, being an English writer on the civil law, what he lays down is some evidence of what has been received here), Part 1, sec. 7; but, in other places, sec. 6, in tit. Definition of Legacy, he is still more express. In both places, in one directly, in the other collaterally, he lays down, that delivery is necessary.

Next, consider it on the resolutions of this Court; the same thing results from them. There are not many cases on this head, and they are somewhat loose. The first is *Drury* v. *Smith*, 1 P. Wms. 404, where Lord *Cowper* founded himself on this, and the possession transmitted and changed; next *Lawson* v. *Lawson*, 1 P. Wms. 441. All that I can recollect from thence is, that the [gift of the]

purse was held good, because delivered to the wife herself. As to the other legacy of 100*l.* bill, I cannot say on what it depended. It is a kind of compound gift; so many collateral circumstances are taken into it, that nothing can be inferred from it; but, being a draught on his goldsmith, that draught was delivered; so that it does not contradict what I lay down; and there was delivery, so far as it was capable. In *Jones* v. *Selby*, Prec. Ch. 300, the result is, that the opinion of the Master of the Rolls was founded plainly on this, of the delivery of possession, holding, that the gift of the tally, as contained in the hair trunk, was a good donation mortis causâ; and that Lord *Cowper* avoided determining that, on the foundation of the subsequent point of a satisfaction or ademption, on which he grounded his determination. In all the instances, it is absolutely necessary to be the person's after the party's death; though, in some cases, it vest the property, in others not. But, to explain more fully Lord *Cowper's* opinion there, I will refer you back to *Drury* v. *Smith*, and to *Hedges* v. *Hedges*, Prec. Ch. 269, which turned on another point; but there Lord *Cowper* laid down a necessity of delivery very strongly; where he says, testator "gives with his own hands." *Snellgrove* v. *Baily* (*a*), determined by me, 11th March, 1744, was urged, where a bond was given in prospect of death; the manner of gift was admitted; the bond was delivered; and I held it a good donation mortis causâ. It was argued, that there was no want of actual delivery there, or possession, the bond being but a chose in action; and, therefore, there was no delivery but of the paper. If I went too far in that case, it is not a reason I should go further, and I choose to stop there. But I am of opinion that decree was right, and differs from this case; for, though it is true that a bond, which is specialty, is a chose in action, and its principal value consists in the thing *in action*, yet some property is conveyed by the delivery; for the property is vested, and to this degree, that the law books say, the person to whom this specialty is given, may cancel, burn, and destroy it; the consequence of which is, that it

(*a*) 3 Atk. 214.

puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a profert in curiam (*a*). Another thing made it amount to a delivery, that the law allows it a locality; and, therefore, a bond is bona notabilia, so as to require a prerogative administration, where a bond is in one diocese and goods in another. Not that this is conclusive; this reasoning I have gone upon, is agreeable to Jenk. Cent. 109, case 9, relating to delivery to effectuate gifts. How Jenkins applied that rule of law he mentions there, I know not; but rather apprehend he applied it to a donation mortis causâ; for if to a donation inter vivos, I doubt he went too far.

(*a*) An action may, however, now be brought without profert. See *Duffield* v. *Elwes*, 1 Bligh, N. S. 543.

Another case is *Miller* v. *Miller*, 3 P. Wms. 356; which is a very strong case, so far as that opinion goes, to require delivery; which case, I believe, was hinted at as inconsistent with my decree; but there is a great difference between delivery of a bond, (which is a specialty, is itself the foundation of the action, and the destruction of which destroys the demand,) and the delivery of a note payable to bearer, which is only evidence of the contract. Therefore, from the authority of Swinburne, and all these cases, the consequence is, that by the civil law, as received and allowed in England, and consequently by the law of England, *tradition or delivery is necessary to make a good donation mortis causâ;* which brings it to the question, whether delivery of the three receipts was a sufficient delivery of the thing given, to effectuate the gift. I am of opinion it was not.

It is argued, that though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of anything by way of symbol is sufficient; but I cannot agree to that; nor do I find any authority for that in the civil law, which required delivery to some gifts, or in the law of England, which required delivery throughout. Where the civil law requires it, they require actual tradition, delivery over of the thing. So in all the cases in this court, delivery of the thing given is relied on, and not in the name of the thing, as in the delivery of sixpence, in

Shargold v. *Shargold;* if it was allowed any effect, that would have been a gift mortis causâ, not as a will, but that was allowed as testamentary, proved as a will, and stood. The only case wherein such a symbol seems to have been held good, is *Jones* v. *Selby;* but I am of opinion that amounted to the same thing as delivery of possession of the tally, provided it was in the trunk at the time. Therefore, it was rightly compared to the cases upon 21 Jac. 1, as *Ryall* v. *Rowles* (*a*), and others. It never was imagined, on that statute, that delivery of a mere symbol in the name of the thing, would be sufficient to take it out of that statute; yet, notwithstanding delivery of the key of bulky goods, where wines, &c., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing: and, therefore, the key is not a symbol, which would not do. If so, then delivery of these receipts amounts to so much waste paper; for if one purchases stock or annuities, what avail are they after acceptance of the stock? It is true, they are of some avail as to the identity of the person coming to receive; but after that is over, they are nothing but waste paper, and are seldom taken care of afterwards. Suppose Fly, instead of delivering over these receipts to Mosely, had delivered over the broker's note, whom he had employed, that had not been a good delivery of the possession. There is no colour for it; it is no evidence of the thing, or part of the title to it; for suppose it had been in a mortgage in question, and a separate receipt had been taken for the mortgage money, not on the back of the deed (which was a very common way formerly, and is frequently seen in the evidence of ancient titles), and the mortgagee had delivered over this separate receipt for the consideration-money, that would not have been a good delivery of the possession, nor given the mortgage, mortis causâ, by force of that act (*b*). Nor does it appear to me, by proof, that

(*a*) 1 Ves. 348.

(*b*) That reasoning is quite idle unless Lord *Hardwicke* meant to say that delivery of the deed with a receipt upon the back of it, not by force of the delivery of the receipt on the back of it, but by force of the delivery of the deed, would be a good donatio mortis causâ. Per Lord *Eldon*, in *Duffield* v. *Elwes*, 1 Bligh, N.S. 543.

possession of these three receipts continued with Mosely from the time they were given, in February, to the time of Fly's death; for there is a witness who speaks, that, in some short time before his death, Fly showed him these receipts, and said, he intended them for his uncle Mosely. Therefore, I am of opinion, it would be most dangerous to allow this donation mortis causâ, from parol proof of delivery of such receipts, which are not regarded or taken care of after acceptance; and if these annuities are called choses in action, there is less reason to allow of it in this case than in any other chose in action, because stocks and annuities are capable of a transfer of the legal property by Act of Parliament, which might be done easily; and if the intestate had such an aversion to make a will as supposed, he might have transferred to Mosely; consequently, this is merely legatory, and amounts to a nuncupative will, and contrary to the Statute of Frauds, and would introduce a greater breach on that law than was ever yet made; for if you take away the necessity of delivery of the thing given, it remains merely nuncupative. To this purpose, consider the clauses in the Statute of Frauds (*a*) relating to this; which seem to me to be applied directly to prevent a mischief of this sort. The clauses are in sections 19, 20, 21, 22 (*b*), which have very anxious provisions against dispositions of this kind, requiring three witnesses, solemn declaration of the testator, fixing the place of making, and to be reduced into writing in six days after making. These are in cases where no will was made. Next, comes another requisite, where a will has been made. If what the plaintiff insists on is right in point of law, that this gift of the annuities by delivery of the receipts was good, yet, though Fly had made a will before, it had been equally good, notwithstanding that will, because this relates to revocation of a will in writing by anything amounting to a testamentary act. It would be good against the will, as appears from the cases. Would not that be quite contrary to the plain provision of this clause, taking away delivery of the thing? Here is, then, a revocation of a will by words only; viz.:

(*a*) 29 Car. 2, c. 3.

(*b*) These sections are repealed by 1 Vict. c. 26, s. 2; but as to the wills of soldiers on service, or mariners, and as to the wills of petty officers, seamen, non-commissioned officers of marines, and marines, so far as relates to money arising from service, see ss. 11 & 12, & 11 Geo. 4 & 1 Will. 4, c. 20.

"This is yours when I die;" all these clauses, therefore, will be overturned, if such evidence is admitted. But it is said, if this is not allowed, it will be impossible to make a donation mortis causâ, of stock or annuities, because in their nature they are not capable of actual delivery. I am of opinion, it cannot, without a transfer, or something amounting to that: and there is no harm in it, considering how much of the personal estate of this kingdom, vastly the greatest proportion of it, subsists now in stock and funds; and all the anxious provisions of the Statute of Frauds will signify nothing, if a donation of stock, attended only by delivery of the paper, is allowed. It might be supported to the extent of any given value, and would leave these things under the greatest degree of uncertainty, and amount to a repeal of that useful law as to all this part of the property of the subjects of this kingdom. Therefore, notwithstanding the strong evidence of the intent, this gift of annuities is not sufficiently made within the rules of the authorities; and I am of opinion not to carry it further. If any doubt remains in any one's mind, I will add (what I very seldom do, though it has been done by my predecessors), that I should be very glad to have this point settled by the supreme authority; for it highly ought to be settled, if there is a doubt, considering so large a property of this kind.

The bill ought to be dismissed therefore, without costs, as to the demand of these annuities, or any other part of the intestate's estate by way of donation mortis causâ.

But as there was a plain intent of bounty and kindness to this old man, who lived with him as a servant, and it seems, in expectation of what should be given at his death, therefore, on the other part of the bill an inquiry should be, what Mosely deserved over and above his maintenance, for services performed during the life of Fly. The account should be taken from a reasonable time, if the plaintiff thinks fit to pay it.

In *Ward* v. *Turner*, which is a leading case on the doctrine of donations mortis causâ, Lord *Hardwicke*, with great learning, discusses the authorities upon the civil law, from which it has been imported into the law of England. See *Duffield* v. *Elwes*, 1 Bligh, N. S. 536; 1 Dow & C. 10.

In the subsequent case of *Tate* v. *Hilbert*, 2 Ves. jun. 111, *Ward* v. *Turner* was commented on, and the civil law more fully explained, by Lord *Rosslyn*, in his very able judgment. "All the passages in Swinburne," said his Lordship, "are only references to different texts of the civil law; and where he defines donatio mortis causâ he is coupling the description of a legacy with a very short text of the civil law; there is a perplexity in it. He takes it from a part of the civil law compiled at a time when the subject itself rested in a degree of contradiction, and it was the common topic of debate, whether gifts under such circumstances resembled a gift or a legacy . . . . The two first species of which he makes mention, are clearly mere donations. Swinburne has there taken an authority from the Digest, which he refers to, and has copied. It does state these donations, and rates them all under the general title, Donatio mortis causâ.

"That is the time when it was in dispute. 'Julianus, libro 17, Digestorum, tres esse species mortis causâ donationum ait; unam, cum quis nullo præsentis periculi metu conterritus; sed solâ cogitatione mortalitatis, donat. Aliam esse speciem mortis causâ donationum ait, cum quis imminente periculo commotus ita donat, ut statim fiat accipientis. Tertium genus esse donationis ait, si quis periculo motus non sic det, ut statim faciat accipientis, sed tunc demum, cum mors fuerit insecuta.'

"If he had looked a little further under the same title, he would have found there an opposite, but a much more correct opinion, which finally prevailed, and was established as legal. It is the twenty-seventh law: 'Ubi ita donatur mortis causâ, ut nullo casu revocetur, "*mors*" (that must be supplied) causa donandi magis est, quam mortis causâ donatio: et ideo perinde haberi debet atque alia quævis inter vivos donatio; ideoque inter viros et uxores non valet; et ideo nec Falcidia locum habet quasi in mortis causâ donatione.' In the Institutions, in the time of Justinian, tit. 7, De Donationibus, there is a history given of these contests that had prevailed; and a definition is strictly given of what shall be donatio mortis causâ. 'Mortis causâ donatio est, *quæ propter mortis fit suspicionem*, cum quis ita donat, ut si quid humanitùs ei contigisset, haberet is qui accepit, sin autem supervixisset, is, qui donavit, reciperet; vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit.

Hæ mortis causâ donationes ad exemplum legatorum redactæ sunt per omnia : nam cum prudentibus ambiguum fuerat utrum donationis an legati instar eam obtinere operteret, et utriusque causæ quædam habebat insignia et alii ad aliud genus eam retrahebant; a nobis constitutum est; ut per omnia fere legatis connumeretur, et sic procedat quemadmodum nostra constitutio eam formavit. Et in summâ mortis causâ donatio est, cum magis se quis velit habere quàm eum, cui donat, magisque eum cui donat, quàm hæredem suum:' Just Inst., tit. 7, De Donationibus. There it is clearly and correctly defined, that it had in effect the nature of a legacy, and was liable to debts, and that it was only a gift upon survivorship ; and the danger of suffering these gifts to be taken loosely occasioned, at the same time, with the passage I have read, an ordinance of the emperor, that it should be in writing, with five witnesses. In the case before Lord *Hardwicke* (*Ward* v. *Turner*), in which all the cases were very fully considered, he takes notice of this perplexity in the reasoning, before it was properly defined; but considers clearly, that by the law of England, it cannot be a present, absolute gift, but to take effect on the death of the party."—Per Lord *Rosslyn*, in *Tate* v. *Hilbert*, 2 Ves. jun. 118; and see *Staniland* v. *Willot*, 3 Mac. & G. 674.

Requisites to a Donatio Mortis Causâ.]—The following circumstances are requisite in order to constitute a good donatio mortis causâ :—

1. *Contemplation of death.*—The gift must be made by the donor in contemplation of the conceived approach of death (*Duffield* v. *Elwes*, 1 Bligh, N. S. 530 ; *Edwards* v. *Jones*, 1 My. & Cr. 233, 236); otherwise it will not be a good donatio mortis causâ (*Hedges* v. *Hedges*, Prec. Ch. 269 ; *Walter* v. *Hodge*, 2 Swanst. 92, 100) ; but a gift will be presumed to be in contemplation of death, where the donor is "in his last sickness," or "languishing on his death-bed:" *Miller* v. *Miller*, 3 P. Wms. 356 ; *Lawson* v. *Lawson*, 1 P. Wms. 441 ; *Walter* v. *Hodge*, 2 Swanst. 100 ; but see the dictum of Chief Baron *Eyre* in *Blount* v. *Burrow*, 1 Ves. jun. 546.

2. *Effective only on donor's death.*—The gift must be intended to take complete effect only after the donor's decease : *Edwards* v. *Jones*, 1 My. & Cr. 233 ; *Tate* v. *Hilbert*, 2 Ves. jun. 120. But it is not absolutely necessary that the donor should expressly declare that the gift is to be returned to him if he recover, for if it be made in the extremity of sickness, or in contemplation of death, the law implies a condition, that it is to be held only by the donee in the event of the donor's death. Thus, in *Gardner* v. *Parker*, 3 Madd. 184, A. being seriously ill,

two days before his death, in the presence of a servant, gave B. a bond, saying at the same time, "There, take that, and keep it." Sir *John Leach*, V. C., held the gift to be a donatio mortis causâ. "The doubt," said his Honor, "here is, that the donor has not expressed that the bond was to be returned if he recovered. This bond was given in the extremity of sickness, and in contemplation of death; and it is to be inferred, that it was the intention of the donor that it should be held as a gift, only in case of his death. If a gift is made in expectation of death, there is an implied condition, that it is to be held only in the event of death. The cases of *Lawson* v. *Lawson* (1 P. Wms. 441); *Miller* v. *Miller*, (3 P. Wms. 358); *Jones* v. *Selby* (Prec. Ch. 300), furnish, this rule." And see *Tate* v. *Leithead*, Kay, 658, 662.

If, however, it appear from the circumstances of the transaction, that the donor intended to make an immediate and irrevocable gift, it will not be a good donatio mortis causâ. Thus, in *Edwards* v. *Jones*, 1 My. & Cr. 226, M. C. the obligee of a bond, five days before her death, signed an indorsement, not under seal, upon the bond as follows: "I, M. C., do hereby assign and transfer the within bond or obligation, and all my right, title, and interest thereto, unto and to the use of my niece E. E., with full power and authority for the said E. E. to sue for and recover the amount thereof, and all interest now due, or hereafter to become due, thereon." It was argued, that if the gift could not, in consequence of its being incomplete, take effect as a donatio inter vivos, it would take effect as a donatio mortis causâ. But Lord *Cottenham* held that it could not take effect as a donatio mortis causâ, as an absolute and irrevocable gift was intended. "A party," observed his Lordship, "making a donatio mortis causâ does not part with the whole interest, save only in a certain event; and it is of the essence of such a gift that it shall not otherwise take effect. A donatio mortis causâ leaves the whole title in the donor, unless the event occurs which is to divest him. Here, however, there is an actual assignment, by which the donor, M. C., transfers all her right, title, and interest in the subject, to her niece; and that is really the whole evidence of the transaction; for the testimony of several persons, who were present, proves that it was intended as a gift; and though others speak as to an intention being expressed, inconsistent with the written document, very little attention can be paid to statements of what passed, when contradicted by the act of the party, as evidenced by a written instrument. . . . . There is not very precise evidence as to the time when these bonds got into the possession of

the plaintiff. There is also a defect of evidence, to show that at the time at which the transaction took place, M. C. was in such a state of illness, or expectation of death, as would warrant a supposition that the gift was made in contemplation of that event. These considerations, however, do not appear to be very material, because I consider the language of the assignment itself to exclude the possibility of treating this as a donatio mortis causâ." *Moore* v. *Moore*, 18 L. R. Eq. 474, 484.

Although there be an actual legal transfer of property such as, standing by itself alone, would amount to a complete gift inter vivos, it will nevertheless be a donatio mortis causâ if there be annexed to the gift a condition either express or implied that it is only to take effect in the event of the death of the giver, and upon his recovery the donee will be a mere trustee (*Staniland v. Willott*, 3 Mac. & G. 664) unless there be a confirmation of the gift, so as to convert it into, or give it the effect of, an absolute irrevocable gift inter vivos (Ib. 681).

3. *Delivery.*—There must be a delivery or traditio of the subject of the gift to the donee for his own use: (*Tate* v. *Hilbert*, 2 Ves. jun. 120); or upon trust for another person (*Drury* v. *Smith*, 1 P. Wms. 405; *Farquharson* v. *Cave*, 2 Coll. 367; *Moore* v. *Darton*, 4 De G. & Sm. 517; and see *Bibby* v. *Coulter*, Ridg. Ca. t. Hard. 206, n.; *Dunne* v. *Boyd*, 8 I. R. Eq. 609); or for a particular purpose: see *Blount* v. *Burrow*, 4 Bro. C. C. 71, where the donor, twelve days before his death, delivered to the donee four India bonds, to enable him to carry on and maintain a law-suit, which the donor had commenced. Lord Commissioner *Eyre* held it to be good donatio mortis causâ, but he directed an issue, to try whether the bonds were delivered.

It was, indeed, argued in *Hambrooke* v. *Simmons*, 4 Russ. 25, that a donatio mortis causâ could not be coupled with a condition, or made subject to a trust; but as an issue was directed, which left the question of law, as well as of fact, to the consideration of a court of law, the point was not decided. However, in the subsequent case of *Hills* v. *Hills*, 8 M. & W. 401, where a person on her death-bed gave a pocket-book, containing 80*l* in cash and notes, to her brother, wishing that he should bury her, and that he should have all she had, it was held, in the Exchequer, by *Abinger*, C. B., *Parke*, B., *Alderson*, B., and *Rolfe*, B., that it was a good donatio mortis causâ, although coupled with a trust. "I cannot see," said Mr. Baron *Rolfe*, "how the annexation of a trust to the gift can make any difference. If it be lawful so to give the property out and out to the party for his own use, I cannot see that it makes any difference, that with it he is to pay

for a particular thing. If a man on his death-bed gives another 1000*l.*, is it any addition to the evils attending this mode of bestowing property, that he attaches a condition to it; as, for instance, that he stipulates, that his brother shall receive an outfit to India? The case of *Blount* v. *Burrow* is expressly in point, and disposes of the question; and I have no doubt that other cases might be found."

These decisions rightly follow the civil law, according to which it is clear, that a donatio mortis causâ might be made the subject of a trust or condition. "Eorum quibus mortis causâ donatum est, fide committi quoquo tempore potest; quod fidei commissum, hæredes, Salva Falcidiæ ratione, quam in his quoque donationibus exemplo legatorum, locum habere placuit, præstabunt. Si pars donationis fidei commisso teneatur, fidei commissum quoque munere Falcidiæ fungetur. Si tamen alimenta præstari voluit, collationis totum onus in residuo donationis esse respondendum erit ex defuncti voluntate, qui de majore pecuniâ præstari non dubiè voluit integra." Dig. lib. 31, tit. 1, l. 77, s. 1, cited 4 Russ. 27, 2 Coll. 356. "Ab eo, qui neque legatum neque fidei commissum, neque hæreditatem vel mortis causâ donationem accepit nihil per fidei commissum relinqui potest." Cod. lib. 6, tit. 42, l. 9, cited 4 Russ. 27. Sed vide *Bibby* v. *Coulter*, Ridg. Ca. t. Hard. 206 n.

A delivery in order to be effectual must be made either to the donee himself or to some one for him. A mere delivery to an agent, in the character of agent for the giver, will not be sufficient (*Farquharson* v. *Cave*, 2 Coll. 356, 367); the delivery also, when there are any declarations made by the donor relative to the subject-matter of the gift, should be contemporaneous with them (*Thompson* v. *Heffernan*, 4 D. & War. 285; *Hawkins* v. *Blewitt*, 2 Esq. 664; *Dunne* v. *Boyd*, 8 I. R. Eq. 609); and even if there be a delivery to the donee or to some one for him, it will not be good, unless the donor (subject of course to the ordinary condition making void the gift, which is always either expressed or implied in case of his recovery) parts with the dominion over the thing given. Thus in *Hawkins* v. *Blewitt* (2 Esp. 663), in an action of trover for a box containing money and wearing apparel, by an administrator, the case on the part of the plaintiff was, that the intestate in his last illness ordered the box to be carried to the house of the defendant, who was his aunt, and to be delivered to her; but he gave no other directions respecting it, nor said anything about giving it to her. It was, however, further given in evidence, that on the next day, the key was brought to the intestate, who desired it to be taken back, saying that he should want some articles of clothing out

of it. The plaintiff had a verdict. Lord *Kenyon*, C. J., said, "In the case of a donatio mortis causâ, possession must be immediately given; that has been done here: a delivery has taken place, but it *is also necessary that by parting with the possession, the deceased should also part with the dominion over it.* That has not been done here. The bringing back the key by her the next morning to the intestate, and his declaration that he should want one of the articles of his apparel contained in it, are sufficient to show that he had no intention of making any gift or disposition of the box. It seems rather to have been left in the defendant's care for safe custody, and was so considered by herself." See also *Reddel* v. *Dobree*, 10 Sim. 244; *Tapley* v. *Kent*, 1 Robert. 400; *Warriner* v. *Rogers*, 16 L. R. Eq. 340.

A delivery of a thing by way of symbol, according to the opinion of Lord *Hardwicke*, in the principal case, is not a sufficient delivery. Thus, he held that the delivery of the receipts for South Sea Stock was not a sufficient delivery to constitute a donatio mortis causâ, but he said that an actual transfer, or something amounting to that, would have been necessary, *ante*, p. 1000. The same conclusion has been arrived at with regard to scrip-certificates of railway stock. *Moore* v. *Moore*, 18 L. R. Eq. 474.

And it has been held that the delivery of the book of a depositor in a savings-bank, is not a sufficient delivery to constitute a donation of the money deposited: *M'Gonnell* v. *Murray*, 3 I. R. Eq. 460. Nor will the delivery of a note not payable to the bearer (*Miller* v. *Miller*, 3 P. Wms. 356); nor in general of a cheque upon a banker (*Tate* v. *Hilbert*, 2 Ves. jun. 111; 4 Bro. C. C. 286), unless it were presented or negotiated (*Rolls* v. *Pearce*, W. N. April 28, 1877, p. 98; *Hewitt* v. *Kaye*, 6 L. R. Eq. 198) before the donor's death, although the pass-book be delivered up with the cheque (*Beak* v. *Beak*, 13 L. R. Eq. 489), be a sufficient delivery. See, also, *Bromley* v. *Brunton*, 6 L. R. Eq. 275, where the gift was inter vivos. The ground of these decisions is this, that a cheque has no relation to the donor's death: it is a gift to take place immediately, and, being merely an authority to receive a sum of money, it is effectually revoked by the death of the donor. However, in *Lawson* v. *Lawson*, 1 P. Wms. 41, where A., during his last illness, drew a bill upon a goldsmith for the payment of 100*l.* to his wife, with a written indorsement that the money was "to buy her mourning," and A. delivered the note to his wife, it was held that she was entitled to the money. And Lord *Rosslyn*, in *Tate* v. *Hilbert*, 2 Ves. jun. 111, notwithstanding Lord *Hardwicke*, in the principal case, throws some doubt upon it, considered the case

perfectly well decided. "For," he observed, "taking the whole bill together, it is an appointment of the money in the banker's hands to the extent of 100*l.*, for the particular purpose expressed in a written appointment; *which is a purpose* that *necessarily supposes his death.*"

In *Jones* v. *Selby,* Prec. Ch. 300, where it was held by Sir *John Trevor,* M. R., that the delivery of the key of a trunk, with words of gift of the trunk and its contents, was a good delivery of a tally upon government for 500*l.* contained in the trunk, Lord *Hardwicke* observes, that the transaction "amounted to the same thing as a delivery of possession of the tally, provided it was in the trunk at the time."

In *Boutts* v. *Ellis,* 4 De G. M. & G. 249, a person four days before his death said to his wife: "I am a dying man, you will want money before my affairs are wound up." On the following day he signed and delivered to her a crossed cheque upon his bankers for 1000*l.*, and on the next day but one, remembering that the cheque was crossed, he asked a friend who visited him to take it; and give the wife another for it; which the friend did, but his cheque was post-dated. The donor's cheque was paid before his death to his friend, who, after that event, gave to the widow a cheque not post-dated for the other. It was held by the Lords Justices, affirming the decision of Sir *J. Romilly,* M. R. (reported 17 Beav. 121), that the transaction constituted a good donatio mortis causâ.

The case of *Snellgrove* v. *Baily* (3 Atk. 214, Ridg. Ca. t. Hardw. 202) has established, that there may be a donatio mortis causâ of a bond, though not of a mere simple contract debt, nor by the delivery of a mere symbol.—Per Sir *John Leach* V. C., in *Gardner* v. *Parker,* 3 Madd. 185; and see *Blount* v. *Burrow,* 4 Bro. C. C. 71; *Hirst* v. *Beach,* 4 Madd. 351, 356; *Clavering* v. *Yorke,* 2 Coll. 363, n. So, likewise, of bank-notes (*Shanley* v. *Harvey,* 2 Ed. Rep. 125; *Ashton* v. *Dawson,* Sel. Ch. Cas. 14); of a deposit-note given by a bank to the donor (*Witt* v. *Amis,* 1 Best & Sm. 109; *Moore* v. *Moore,* 18 L. R. Eq. 474; *Dunne* v. *Boyd,* 8 I. R. Eq. 609); and, it seems, also, of all other notes, or bills payable to the bearer (*Miller* v. *Miller,* 3 P. Wms. 356; *Hill* v. *Chapman,* 2 Bro. C. C. 612; and see *Jones* v. *Selby,* Prec. Ch. 300; *Bibby* v. *Coulter,* Ridg. Ca. t. Hard. 206, n.), or to order, though not indorsed by the donor (*Rankin* v. *Weguelin,* 27 Beav. 309; *Veal* v. *Veal,* Ib. 303). And the delivery of a bond is still sufficient as a donatio mortis causâ of the debt for which it is a security, although an action may, in certain cases, be maintained at law without profert of the bond: *Duffield* v. *Elwes,* 1 Bligh, N. S. 543.

So likewise a policy of insurance on the life of the donor will pass by delivery as a donatio mortis causâ: *Witt* v. *Amis*, 1 Best & Sm. 109; *Amis* v. *Witt*, 33 Beav. 619.

A delivery of the mortgage deeds of real estate will constitute a valid donatio mortis causâ. This was decided in the case of *Duffield* v. *Elwes*, 1 Bligh, N. S. 497; 1 Dow & C. 1, in the House of Lords (reversing the decision of Sir *John Leach*, V. C., reported 1 S. & S. 239). In that case, a man, in contemplation of speedily approaching death, wishing to make a larger provision for his daughter than he had done by will, delivered, or caused to be delivered, to her, certain deeds, which consisted of, 1. A conveyance in fee of lands to secure 2927*l.*, with the usual covenant for payment of the money lent, and a bond, by way of collateral security. 2. An assignment of a mortgage debt of 30,000*l.*, and of a judgment for that sum recovered on a bond, with the conveyance of the land, and the usual covenant for the payment of the money. Sir *John Leach*, V. C., in deciding that the gift did not constitute a good donatio mortis causâ even of the bond, which accompanied one of the mortgages, observed, that where delivery would not constitute a complete gift inter vivos, it could not create a donatio mortis causâ, because it would not prevent the property from vesting in the executors; and, as a court of equity would not inter vivos compel a party to complete his gift, so it would not compel the executor to complete the gift of his testator. The delivery of a mortgage deed could not pass the property inter vivos: first, because the action for the money must still be in the name of the donor; and, secondly, because the mortgagor is not compellable to pay the money without having back the mortgaged estate, which could only pass by the deed of the mortgagee; and no court would compel the donor to complete his gift by executing such a deed. As to the case where the bond accompanied the mortgage, he came to the same conclusion, as he thought that the delivery of the bond, where there is also a mortgage, cannot be considered as a gift completed, as the mortgagor had a right to resist the payment of the bond, without a reconveyance of the estate; and it could not be maintained, that the donor of the bond would be compelled to complete his gift by such reconveyance. It was held, however, by the House of Lords, that there was a good donatio mortis causâ, and that the daughter was entitled to the benefit of the securities. "If," said Lord *Eldon*, "the delivery of a bond would, as it is admitted—(notwithstanding any change in the doctrine about profert)—if the delivery of a bond would give the debt in that bond, so as to secure

to the donee of that bond the debt so given by the delivery of the bond, the question is, whether, the person having got, by the delivery of that bond, a right to call upon the executor to make his title by suing or giving him authority to sue upon the bond, what are we to do with the other securities if they are not given up? But there is another question, to which an answer is to be given: What are we to do with respect to the other securities, if they are delivered? In the one case, the bond and mortgage are delivered; in the other the judgment, which is to be considered on the same ground as a specialty, is delivered; with that, the evidences of the debts are all delivered. The instrument containing the covenant to pay is delivered. They are all delivered in such a way that the donor could never have got the deeds back again. Then the question is, whether, regard being had to what is the nature of a mortgage, contra-distinguishing it from an estate in land, those circumstances do not as effectually give the property in the debt as if the debt was secured by a bond only?

"The opinion which I have formed is, that this is a good donatio mortis causâ, raising by operation of law a trust; a trust which, being raised by operation of law, is not within the Statute of Frauds, but a trust which a court of equity will execute." See also *Meredith* v. *Watson*, 17 Jur. 1063; *Re Patterson*, 10 Jur. N. S. (V. C. S.) 578.

The delivery by a creditor to the debtor or his agent of that which is essential to the recovery of the debt is, it seems, sufficient. Thus, in *Moore* v. *Darton*, 4 De G. & Sm. 517, where, upon a loan, the borrower had given the lender a receipt in the following form: "Received of Miss Darton 500*l.*, to bear interest at 4*l.* per cent. per annum," it was held by Lord Justice *Knight Bruce* (then V.-C.) that a delivery of the receipt to an agent of the borrower by the creditor on her death-bed stating that she wished the debt to be cancelled, was a good donatio mortis causâ. "It is true," said his Lordship, "that the delivery of a bond is not the delivery of the mere evidence of a debt, for it is the delivery of that without which the debt would not have been a specialty. Its continuance in existence is not now material, however that might have been considered formerly. The delivery of an instrument creating a specialty debt, without which it would not have been a specialty debt, as in the case of a bond, would be sufficient for the purpose of a donatio mortis causâ; and so Lord *Eldon* decided as to a mortgage. That, however, I agree, does not go the length of deciding that the delivery of the mere evidence of a debt would be sufficient. In this case there was

something more. The document here has been called a receipt, and is a receipt in a sense, but it is not a receipt in the ordinary acceptation of that term. It was a document contemporaneous, I take it, with the creation of the debt. It was delivered to the agent of the debtor himself. The debt was a debt carrying interest. A mere debt of 500*l.*, would have arisen from a loan, without any writing. But it would not have been a debt carrying interest, without a contract to that effect beyond the advance. That particular contract I agree might have been entered into without writing: but as it was created by writing, proof of the writing, if possible, was essential to recovery upon the contract. This writing was, therefore, essential to the proof of the contract; and it is this writing which was in substance delivered mortis causâ to the person owing the money. In my opinion it is consistent with what was said by Lord *Hardwicke*, Lord *Rosslyn*, and Lord *Eldon*, with the civil law, and our own, to hold as I do, that this was a sufficient delivery to constitute a donatio mortis causâ, which, in my judgment, it was intended to be."

It is clear that a donatio mortis causâ cannot be made merely by parol, without delivery, as in the case of the alleged gift of the household goods and plate in the principal case: see *Tate* v. *Hilbert*, 2 Ves. jun. 120; *Smith* v. *Smith*, 2 Stra. 955; *Warriner* v. *Rogers*, 16 L. R. Eq. 340.

In *Spratley* v. *Wilson*, 1 Holt, 10, *Gibbs*, C. J., held that it was a sufficient delivery where a person in extremis said, "I have left my watch at Mr. R.'s, at Charing Cross: fetch it away, and I will make you a present of it;" but, upon this case being cited in *Bunn* v. *Markham*, 7 Taunt. 227, *Gibbs*, C. J., desired that it might be laid out of the consideration of counsel, for that, immediately after that trial, he perceived that what he had somewhat unprovidently thrown out could not be maintained, because a delivery was wanting, and he had accordingly written a remark to that effect at the end of his own note of the case.

In *Bunn* v. *Markham*, 7 Taunt. 224, a person, supposing himself in extremis, caused Indian bonds, bank notes, and guineas, to be brought out of his iron chest, and laid on his bed; he then caused them to be sealed up in three parcels, and the amount of the contents to be written on them, with the words, "For Mrs. and Miss C.," the plaintiffs; he then directed the brother to replace them in the iron chest, to be locked up, the keys to be sealed up, and directed "to be delivered to J." (his solicitor), and one of his executors, after his decease, and replaced in his own custody near his bed; and afterwards spoke

of this property as given to the plaintiffs. It was held not to be a donatio mortis causâ, for want of a sufficient delivery, and on account of the donor continuing in possession. See, also, *Farquharson* v. *Cave*, 2 Coll. 356; *Walsh* v. *Studdart*, 4 D. & W. 159; *Thompson* v. *Heffernan*, 4 D. & W. 285; *Powell* v. *Hellicar*, 27 Beav. 261; *Maguire* v. *Dodd*, 9 Ir. Ch. Rep. 452.

In the principal case, Lord *Hardwicke* says, "that a gift mortis causâ may be made in writing as well as otherwise, and that so it might by the Roman and civil law," And see his observations in *Johnson* v. *Smith*, 1 Ves. 314; and Lord *Rosslyn*, in *Tate* v. *Hilbert*, 2 Ves. jun. 120, says, that "perhaps it might not be difficult to conceive that it might be by deed or by writing."

But a gift in writing, without delivery, would probably be considered as testamentary: *Rigden* v. *Vallier*, 2 Ves. 258; *Tapley* v. *Kent*, 1 Robert. 400.

Evidence to establish a donatio mortis causâ.]—The evidence to establish a donatio mortis causâ should be clear and satisfactory, especially in those cases where the relation between the donor and donee is such as to give rise to suspicion that undue influence may have been used, as in the case of an alleged donation from a client to his solicitor (*Walsh* v. *Studdart*, 4 D. & W. 159), or from a person in extremis to a priest attending him to administer the last offices of religion (*Thompson* v. *Heffernan*, Ib. 285).

There is no absolute rule of the Court that a gift of this kind may not be established by the evidence of the claimant alone: *M'Gonnell* v. *Murray*, 3 I. R. Eq. 465, but there is no class of questions in which it is more important that corroborating testimony should be insisted on. Ib. "The civil law," says the Master of the Rolls of Ireland, "required five witnesses to establish such a gift; a will requires two with us. It is difficult to suppose that it was not by an oversight that the legislature made no provision respecting gifts of this sort; but, though our law does not define the number of witnesses required, it is laid down in all the cases where judges have commented on the evidence necessary to support a *donatio mortis causâ*, that it must be established by *clear* evidence. The proof must be more than is required merely to turn the scale in favour of one of two equally probable conclusions. It must establish to the satisfaction of the Court that the claimant's case is not only probable, but reasonably free from doubt. In the case of *Cosnahan* v. *Grice* (15 Moo. P. C. C.), some observations are made as to the danger of the Court acting on the evidence of the claimant alone. Without any intention to commit

perjury there is a natural tendency in the human mind to believe what we wish. *Quod volumus facile credimus.* A very slight change—perhaps of a single word—may make a very material difference in the meaning of the language deposed to. There is great danger of its being misrepresented by any witness from being originally misunderstood or inaccurately remembered; but a claimant, proving his own case, has to guard himself against an additional tendency to both sources of error. There is, of course, all the suspicion always attaching to an interested witness as regards candour and truthfulness:" *M'Gonnell* v. *Murray*, 3 I. R. Eq. 465.

Where there is any doubt, whether, in point of fact, there was that which would constitute a good donatio mortis causâ, if in point of law the subject of it can be made the subject of a donatio mortis causâ, it is a very familiar thing to direct an issue or issues to try that fact.—Per Lord *Eldon*, in *Duffield* v. *Elwes*, 1 Bligh, N. S. 531; and see *Blount* v. *Burrow*, 4 Bro. C. C. 71; *Gillespie* v. *Croker*, 16 I. Ch. Rep. 182.

Distinction between a donatio mortis causâ, and a donation inter vivos and legacies.]—A donatio mortis causâ resembles a legacy, inasmuch as it is ambulatory and incomplete during the life of the donor, and may be revoked by him at any time before death, and is liable to his debts on a deficiency of assets (*Smith* v. *Casen*, 1 P. Wms. 406); is subject to legacy duty (36 Geo. 3, c. 52, s. 7; 8 & 9 Vict. c. 76); and may be made to the wife of the donor: *Jones* v. *Selby*, Prec. Ch. 300; *Johnson* v. *Smith*, 1 Ves. 314; *Tate* v. *Leithead*, Kay, 658, 659. And in these respects (except as to a gift to a wife, ante, p. 535) it differs from a gift inter vivos.

A donatio mortis causâ differs in another important respect from a gift inter vivos, inasmuch as a gift mortis causâ must be accompanied by a delivery, whereas a gift inter vivos is complete if made by deed; or if, made by parol, it is accepted by the donee. See notes to *Ellison* v. *Ellison*, ante, p. 290. The notes of Mr. Serjeant Manning, to *Lunn* v. *Thornton*, 1 C. B. 381; and *The London and Brighton Railway Company* v. *Fairclough*, 2 Man. & Gr. 691; and the note to David. Conveyancing, vol. 2. p. 695, 3rd ed.

But a donatio mortis causâ differs from a legacy, inasmuch as it does not require probate, and is taken against, and not from, the executor, whose assent to its enjoyment is not necessary. Thus, in *Thompson* v. *Hodgson*, 2 Stra. 777, where an executor proceeded in the spiritual court against a person for taking, without his consent, a tankard, which the testator gave to him, if he died of his then sickness, a court of common law

granted a prohibition, as it was not a legacy but a donatio mortis causâ, the validity whereof might be tried in an action of trover.

Where the property in a thing made the subject of a donatio mortis causâ does not pass by delivery, as, for instance, in the case of a bond, the donee may, upon indemnifying the personal representatives of the donor, sue in their names for the debt secured by such bond: *Gardner* v. *Parker*, 3 Madd. 184.

If the donor recover of his illness, or if he resume the possession of the gift, it will be defeated. "All the cases," says *Gibbs*, C. J., "agree, that if the donor resumes the possession, it ends the gift. Lord *Hardwicke* expressly so holds, in *Ward* v. *Turner*, where it suited the purpose of the counsel to argue, that, if the donor, after making a complete delivery, receives back the article, the donation remains perfect. Lord *Hardwicke* immediately denied that proposition, and held, that if the possession of the donee do not continue, the gift is at an end:" *Bunn* v. *Markham*, 7 Taunt. 231.

But if the donor does not resume the gift, he cannot revoke it by will, for upon his death the gift becomes complete. See *Jones* v. *Selby*, Prec. Ch. 300; it was, however, decided in that case, that a donatio mortis causâ may be satisfied by a legacy.

It is clear that the donee may be put to his election, if the subject of the donation is bequeathed to another person, and some benefit is conferred by the will upon the donee. See *Johnson* v. *Smith*, 1 Ves. 314.

The Wills Act (1 Vict. c. 26) has not abolished donations mortis causâ, and they have been since expressly recognised by 8 & 9 Vict. c. 76, s. 4. With reference to this subject, Lord Justice *Knight Bruce*, when Vice-Chancellor, observed: "I confess that it appeared to me not free from doubt, whether the Wills Act has not precluded any donations mortis causâ from taking effect. But it does not seem to have ever been so decided or so argued. If against the ordinary rules of construction, a statute passed for the purposes of the revenue can be referred to for the purpose of determining a question of law beyond its scope, it appears that a Revenue Act has in a manner recognised the existence of such gifts. My own opinion is, that according to the true interpretation of the Wills Act, that statute does not avoid such donations:" *Moore* v. *Darton*, 4 De G. & Sm. 519.

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